TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

NATIONAL CASUALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1957

CERTIORARI GRANTED NOVEMBER 12, 1957

SUPREME COURT OF THE UNITED STATES

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[fol. a]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL CASUALTY COMPANY, a Corporation, Petitioner and Appellant,

vs.

FEDERAL TRADE COMMISSION, Respondent and Appellee

Petition to Review Decision of the Federal Trade Commission

Appendix for Appellant

[fol. 1] BEFORE THE FEDERAL TRADE COMMISSION

RELEVANT DOCKET ENTRIES

1955

Mar. 21. Complaint served.

April 18. Answer filed.

May 10, 11. Hearing before Hearing Examiner.

June 13. Hearing Examiner's Order Amending Complaint filed.

July 18. Motion by respondent to Dismiss Complaint filed.

Aug. 24. Hearing Examiner's Order Denying Motion to Dismiss Complaint filed.

Oct. 12, 13. Hearing before Hearing Examiner.

Dec. 8. Hearing Examiner's Initial Decision filed.

Dec. 19. Notice of Appeal by counsel supporting complaint filed.

Dec. 27. Notice of Appeal by respondent filed.

1956

May 21. Opinion of Commission filed.

May 21. Final Order of Commission filed (served on respondent May 31, 1956).

July 30. Petition of respondent National Casualty Company to Review Order of Commission filed in the United States Court of Appeals for the Sixth Circuit.

[fol. 2] BEFORE THE FEDERAL TRADE COMMISSION

COMPLAINT—Filed March 11, 1955

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Casualty Company, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph One: Respondent, National Casualty Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at Detroit 26, Michigan.

Paragraph Two: Respondent is now and for more than two years last past has been, engaged as an insurer in the business of insurance in commerce, as "commerce" is defined in the Federal Trade Commission Act, by entering into insurance contracts with insureds located in various states of the United States other than the State of Michigan, in which states the business of insurance is not regulated by state law to the extent of regulating the practices of respondent alleged in this complaint to be illegal. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said insurance policies in commerce between and among the several states of the United States.

[fol. 3] Respondent during the two years last past has issued a variety of policies providing indemnification for losses resulting in accidental injury and sickness including those identified and designated by it as Policy Form Numbers 950-3G 12-150, 970-36(S.P.) 1-5-53, 8005(S.P.) 4-17-53, 8011-36 6-3-53, 8008(S.P.) 6-15-48, 8010-36 2-17-53, 429-36 1-24-49, 999-36(S.P.) 1-7-53, 968-36(S.P.) 8-18-53, N-430 (S.P.) 1-3-45, 8020 10-12-53, 8019 4-27-51, 8000-36 5-2-51, 955(S.P.) 12-9-40, 8013(S.P.) 1-9-52, 8006(S.P.) 7-30-53,

8007(S.P.) 4-17-53, 8014(S.P.) 12-12-52, 8021 5-8-52, 8018 3-6-51 and 8023 8-19-53.

Respondent is licensed, as provided by respective state laws, to engage in the business of insurance, as heretofore generally described, in all 48 states of the United States, the District of Columbia and the Territory of Hawaii.

Paragraph Three: In the course and conduct of its said business, and for the purpose of inducing purchasers of said insurance policies, respondent has made, and is now making, numerous statements and representations concerning the benefits provided in said policies of insurance, by means of newspaper advertisements, stuffers, circulars, folders, and other advertising material distributed throughout the various states of the United States. Typical, but not all inclusive of said statements and representations, are the following:

1. "No Increase in Premium Because of Age
No Decrease in Benefits Because of Age"
"For Employed Men and Women Ages 16 to 69 years inclusive"

[fol. 4] "For—Individuals or Family Groups—Ages 1 day to 69 years"

"I understand this peace of mind and security will be mine from the first day—even for life."

2. "No Medical Examination Required"
3. "The Most Complete Coverage at the Lowest Rates! Monthly Benefits up to $300.00 Per Month Paid from First Day of Any Sickness or Accident *Plus* $300 Per Month for Hospitalization"

"Hospital Room and Board for 100 days for each sickness or accident. Your choice of plans paying from $5.00 to $12.50 per day. Pays full benefit even if your hospital room costs less!"

"[$15.00 per day] For Hospital Room and Board for 100 Days (Each Disability)"

4. "Surgical Operations, whether performed in or out of the hospital, are paid up to $300.00 In Addition

To Hospital Benefits! Full benefits are paid to all insured members of the family group."

"*Surgery Bills* from $5.00 to $300.00 for sickness or accident."

5. "*Here's What We Would Pay You!*

Monthly Income up to $300.00 for Total Disability from Sickness paid from First Day for Two Years with no *Confinement Required at Any Time.*

Monthly Income up to $300.00 for Total Accident or Confining Sickness Disability paid from *First Day* for as long as totally disabled—*Even For Life.*

"When You are Disabled by Accident or Sickness—
What do You Need Most?

Cash!

[fol. 5] Economy Disability Policy

The Simple Economical Way to Obtain Basic Income Protection

Sound Protection—Low Cost.

for Accident Income $ per month
Accident Total Disability—Full Monthly Benefit for Twelve Months.

Partial Disability—One-half Monthly Benefit For One Month.

for Sickness Income $ per month
Sickness Confining Total Disability—Full Monthly Benefit for Six Months.

Non-Confining Total Disability—Full Monthly Benefit for One Month"

"Your Security . . .
If Injured or Sick

You are protected while at work or away from work—Benefits paid in addition to Compensation and Group Insurance—24 hour every day protection

. . . . . .

Guaranteed Monthly Income for accidents
Guaranteed Monthly Income for sickness"

Paragraph Four: Through the use of such statements and representations, and others of similar import and meaning not specifically set out herein, respondent represents and has represented, directly or by implication:

1. That the policies containing indemnification against losses resulting from sickness or accident can and will be continued, at the option of the insured, until the age of 69 by making premium payments within the time and in the amounts provided by the policy.

2. That in determining whether or not the cash benefits provided for in said insurance policies are payable for losses resulting from sickness or accident that might arise after the effective date, the respondent will not take into [fol. 6] consideration the physical condition of insured prior to or at the time the policy is issued.

3. That said insurance policies provide indemnification in the form of cash benefits to the insured for hospitalization expenses for a definite period of time, if confined in a hospital by any sickness or accident.

4. That said insurance policies provide indemnification for all operations necessitated by any one case of sickness or accident up to a maximum of $300.00.

5. That said insurance policies provide for the payment of monthly indemnification in a specific amount for a definite period of time to insured for loss of time from work by total disability resulting from any accident or sickness.

Paragraph Five: The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Policies containing indemnification against loss resulting from accident and sickness cannot be continued until the age of 69, or any other age, at the option of the insured by the timely and required payment of premiums, but, on the contrary, respondent may refuse to accept any premium payment or give insured written notice of cancellation for any reason or no reason at all, thus terminating such policies.

2. The respondent, by the terms of said policies, does take into consideration the physical condition of the insured prior to or at the time the policies were issued in determining whether or not the cash benefits provided by said in-

surance policies will be paid for loss resulting from sickness or accident after the effective date. The insuring clause [fol. 7] of each of said policies in effect provides that no benefits are payable for any loss resulting from sickness, the cause of which is traceable to a condition existing prior to or within fifteen to thirty days after the effective date of the policy. The insuring clauses, in providing for the payment of a cash benefit for a loss resulting from accident, state that the loss shall result "directly and independently of all other clauses" from accidental bodily injury.

3. Said insurance policies do not provide indemnification in the form of cash benefits to the insureds for hospitalization expenses for a definite period of time, if confined in a hospital by any sickness or accident. On the contrary, said policies provide that no hospital indemnification is payable for any loss due to sickness, the cause of which is traceable to a condition existing prior to the date of the policy or within 30 days after the date of the policy, or 15 days after the date of the policy, and for any accident unless bodily injury is effected directly and independently of all other causes by accidental means.

All of said insurance policies have a provision therein which excepts the liability of the respondent when the loss is caused by certain circumstances, injuries or sickness, such as injury due to the hazards of warfare, suicide or any attempt thereat, while sane or insane, venereal disease or syphilis, any injury or sickness for which benefit is provided by the Workman's Compensation or Occupational Disease Act or Law, pregnancy, including resulting childbirth or miscarriage, or air travel of any character except in a limited way.

Certain of said insurance policies provide that cash bene- [fol. 8] fits are not payable for any loss caused by appendicitis, tonsillitis, or diseases of the female generative organs unless the loss occurs after the policy has been maintained in continuous force for six months. Some of said insurance policies, by the terms thereof, limit the number of days for which loss will be payable for pregnancy, including resulting childbirth or miscarriage, or injury to or disease of the female generative organs to a lesser period than the stated definite period of time.

4. Said insurance policies do not provide indemnification

for operations necessitated by any one case of sickness or accident up to a maximum of $300, unless the operation is one of the six listed in the "Schedule of Operations" having a maximum benefit of $300.00. Said "Schedule of Operations" list ninety operations but in a great majority the maximum provided ranges from $5.00 to $50.00. Said insurance policies provide that only the indemnification for one operation performed because of any one accident or sickness or through the same incision shall be paid.

Said insurance policies provide that no indemnification shall be paid for an operation when the sickness, which necessitates the operation, is traceable to a condition existing prior to or within thirty days after the date of the policy, or for injury unless effected directly and independently of all other causes through accidental means. No loss is payable, under the terms of said policies, for injury due to hazards of warfare, venereal disease, syphilis, any injury or sickness for which benefit is provided under any Workman's Compensation or Occupational Disease Act or Law, any loss caused by air travel of any character excepted in a limited manner. No surgical indemnification shall be payable for tonsillectomy or adenoidectomy unless the loss [fol. 9] occurs after the policy has been maintained in force for six months from the effective date.

5. Said insurance policies do not provide for the payment of monthly indemnification in a specific amount for a definite period of time to the insured for loss of time from work by total disability resulting from any accident or sickness. On the contrary, it is provided that loss of time benefits shall not be payable if caused by any sickness, the cause of which is traceable to a condition existing prior to, or within thirty days after the date of the policy, or forty days after date of the policy, or by any accident unless bodily injury is sustained directly and independently of other causes other than accidental means, or resulting solely from bodily injuries effected directly and independently of all other causes by the happening of an external, violent and accidental event.

Said insurance policies provide that, to be eligible for disability payments as a result of accident, loss of time shall be total, and shall immediately after the accident continuously and wholly prevent the insured from per-

forming any and every duty pertaining to his business or occupation, or be prevented from engaging in any and every occupation or employment from the date of the accident, or five days from date of accident, or fifteen days from date of the accident, or twenty days from date of accident, or thirty days from date of accident, and require the regular care and personal attention of a physician or surgeon.

The said insurance policies provide that to be eligible for loss of time payments, in cases of sickness, the insured must be wholly and continuously disabled by such sickness [fol. 10] and be prevented from performing any and every duty pertaining to any and every occupation or employment, require the care and personal attendance of a physician or surgeon, and in some policies, the sickness shall necessarily and continuously confine the insured within the house.

All of said insurance policies have a provision therein, which by its terms, excludes certain injuries or sickness such as, injury due to the hazards of warfare, venereal disease, syphilis, any injury to or disease of the female generative organs, injuries sustained or sickness contracted outside the continental limits of the United States of America or Canada, and hernia of any kind, however caused.

Certain of said policies contain provisions limiting the indemnification and shortens the stated period of time for which the loss of time indemnification will be paid in the event of certain accidents and sickness. Sunstroke, freezing, felons, abscesses, blood-poison or contact with a poisonous substance shall be covered by the sickness clause only, which provides cash benefits for a shorter period of time than is provided by loss of time caused by accident.

It is provided, under the terms of said insurance policies, that the loss of time indemnification shall not be paid in the event one of the benefits for loss of limb or sight is paid or after one of such losses has been paid.

Paragraph Six: The use by the respondent of the aforesaid false and misleading statements and representations, with respect to the terms and conditions of its said policies, and its failure to reveal the limitations of said coverage found in said policies have had, and now have, a tendency

[fol. 11] and capacity to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations were and are true, and to induce such portions of the purchasing public to purchase a substantial number of said insurance policies by reason of said erroneous and mistaken belief.

Paragraph Seven: The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission on this 11th day of March, A. D., 1955, issues its complaint against said respondent.

NOTICE

Notice is hereby given you, National Casualty Company, respondent herein, that the 10th day of May, A. D., 1955, at 10 o'clock is hereby fixed as the time and Detroit, Michigan as the place when and where a hearing will be had before Frank Hier, a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on [fol. 12] or before the twentieth (20) day after service of it upon you. Such answer shall contain a concise statement of the facts which constitute the ground for defense and shall specifically admit or deny each of the facts alleged in the complaint unless you are without knowledge, in which case you shall so state. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute

a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or of law under Rule XXI, and the right to appeal under Rule XXIII.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission and Hearing Examiner Frank Hier, without further notice, to find the facts to be as alleged herein and to issue the following order in this proceeding:

It Is Ordered that respondent, National Casualty Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, [fol. 13] as "commerce" is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy do forthwith cease and desist from:

(A) Representing, Directly or by implication:

(1) That said insurance policy may be continued in effect indefinitely or for any period of time, when, in fact, said policy provides that it may be canceled by respondent or terminated under any circumstances over which insured has no control, during the period of time represented.

(2) That no medical examination is required or that applicant's health is not a factor, unless the representation is clearly and conspicuously limited in immediate connection therewith to payment of insurance on claims not caused by previous conditions of health of the insured.

(3) That said policy provides for indemnification to insureds in cases of sickness or accident generally or in any or all cases of sickness or accident, when such is not a fact.

(4) That said policy will pay in full, or in any specified amount or will pay up to any specified amount for any medical, surgical or hospital service unless the policy provides that the actual cost to insured for that service will be paid in all cases to the amount represented.

[fol. 14] (5) That said policy of insurance provides a monthly or cash benefit to insureds, when disabled by sickness or accident, for a longer period of time or in a larger amount than is in fact provided.

(6) That said policy provides for cash benefits for loss of time from work or otherwise in cases of sickness or accident generally in any or all cases of sickness or accident when said policy does not provide for such benefits in all such cases.

(B) Misrepresenting in any other manner or by any other means the terms or provisions of said insurance policy.

The inclusion of such order to cease and desist in this complaint will be without effect in the event you show cause, on or before the 10th day of May, A. D., 1955, why such order should not issue.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 11th day of March, A. D., 1955.

By the Commission. (s) Robert M. Parrish (t)
Robert M. Parrish, Secretary.

[fol. 15] BEFORE THE FEDERAL TRADE COMMISSION

ANSWER—Filed April 18, 1955

Respondent, through its attorney, John F. Langs, alleges that the Federal Trade Commission is without jurisdiction in this matter because every activity of the respondent is regulated and supervised by the Insurance Commissioner and the Department of Insurance of the State of Michigan, which under Michigan State Law fully regu-

lates all the activities of the respondent within the scope and meaning of Public Law 15 enacted by the Congress of the United States, and for further answer respondent states:

I

Respondent admits the allegations of paragraph 1.

II

Respondent admits that is it licensed and engaged as an insurer in the business of insurance, entering into insurance contracts with insureds in all 48 States of the United States, and the District of Columbia and the Territory of Hawaii, but denies that it is doing business without regulation by State Law to the extent required by Public Law 15.

Respondent admits that it has, during the last 2 years, issued a variety of policies providing indemnification for losses resulting in accidental injury and sickness, including those identified by policy form numbers as follows:

Policy Form Numbers 950-3G 12-1-50; 970-3G (S.P.) 1-5-53; 8005 (S.P.) 4-17-53; 8011-3G 6-3-53; 808 (S.P.) 6-15-48; 8010-3G 2-17-53; 429-3G 1-24-49; 999-3G (S.P.) 1-7-53; 968-3G (S.P.) 8-18-53; N-430 (S.P.) 1-3-45; 8020 10-12-53; 8019 4-27-61; 8000-3G 5-2-51; 955 (S.P.) [fol. 16] 12-9-40; 80013 (S.P.) 1-9-52; 8006 (S.P.) 7-30-53; 8007 (S.P.) 4-17-53; 8014 (S.P.) 12-12-52; 8021 5-8-52; 8018 3-6-51 and 8023 8-19-53.

As to all other matters alleged in paragraph 2, respondent denies the same.

III

Respondent admits that the factual statements to paragraph 3 are substantially correct, although set forth out of context, but denies the legal conclusions of law therein contained.

IV

(1) Respondent denies that it has represented, directly, or by implication, that its policies containing indemnification against losses resulting from sickness or accident can be continued at the option of the insured.

(2) Respondent denies that it has represented directly, or by implication, that it will not take into consideration the physical condition of the insured prior to or at the time the policy is issued.

(3) Respondent admits that its policies state and provide indemnification for hospitalization caused by sickness or accident, as set forth in the policies, and the amounts stated therein are paid upon the conditions therein set forth; but respondent denies that it has represented directly, or by implication, that its policies do not have exceptions which eliminate claims for unjust enrichment on the part of the insured.

(4) Respondent denies that it has represented directly, or by implication, that its insurance policies provide indemnification for all operations necessitated by any one [fol. 17] case of sickness or accident up to a maximum of $300.00.

(5) Respondent denies that it has represented directly, or by implication, that its insurance policies provide for payment of monthly indemnification in a specific amount for a definite period of time to insured for loss of time from work for total disability resulting from any accident or sickness.

V

(1) Respondent denies the allegations and conclusions set forth in this sub-paragraph.

(2) Respondent denies the allegations and conclusions set forth in this sub-paragraph.

(3) Respondent denies the allegations and conclusions set forth in this sub-paragraph.

(4) Respondent denies the allegations and conclusions set forth in this sub-paragraph.

(5) Respondent denies the allegations and conclusions set forth in this sub-paragraph.

In further answer to paragraph V the respondent depends upon the applicant to tell the truth and the whole truth as he knows the truth in his application, and the applicant's untruthfulness or fraud and pre-existing illness are the only reasons for non-payment of benefits if they would otherwise be due and payable. For respondent to act otherwise would permit the insured to benefit by way of unjust

enrichment as a reward for deceit and fraud, and, further, that all conditions of the policies are set forth in said policies clearly and distinctly, and that the advertising of the [fol. 18] respondent is subject to examination by the Insurance Commissioner of the Department of Insurance for the State of Michigan.

VI

Respondent denies each and every allegation set forth in this paragraph.

VII

Respondent denies each and every allegation set forth in this paragraph.

Respondent further states that it has participated in the highest standards of advertising established by health and accident insurance companies and has constantly sought by meetings with other insurance companies to ever improve the high standard of advertising in this field of insurance, and from time to time is in the continuous process of altering and amending its insurance to conform to the high standards so determined by health and accident insurance companies.

Wherefore, respondent respectfully prays that the complaint filed by the Federal Trade Commission against it be forthwith dismissed.

(s) John F. Langs, Attorney for Respondent, 2508 Guardian Building, Detroit 26, Michigan, Woodward 2-9460.

Date: April 15, 1955.

[fol. 19] BEFORE THE FEDERAL TRADE COMMISSION

ORDER AMENDING THE COMPLAINT—Entered June 13, 1955.

It having been shown that certain insurance policies set out in subparagraph (2) of Paragraph Two of the complaint were erroneously designated and counsel supporting the complaint having moved that the complaint be amended to correctly designate said policies and counsel for respondent having expressed no objection to such correction by amendment;

It Is Ordered that subparagraph (2) of Paragraph Two be amended by changing the designations of the policies therein set out as follows:

Change	"950-30"	to	"950-3G"
"	"970-36"	to	"970-3G"
"	"8011-36"	to	"8011-3G"
"	"8010-36"	to	"8010-3G"
"	"429-36"	to	"429-3G"
"	"999-36"	to	"999-3G"
"	"968-36"	to	"968-3G"
"	"8000-36"	to	"8000-3G"

(s) Frank Hier, (t) Frank Hier, Hearing Examiner.

Washington, D. C., June 13, 1955.

[fol. 20] BEFORE THE FEDERAL TRADE COMMISSION

Excerpts from Transcript of Testimony

(Excerpts from the testimony of witnesses taken in the matter herein before the Honorable Frank Hier, Trial Examiner, for the Federal Trade Commission, in Court Room 859, Federal Building, Detroit 26, Michigan, commencing on May 10, 1955.)

APPEARANCES:

John W. Brookfield, Jr. and Donald K. King, Attorneys for the Federal Trade Commission.

John F. Langs, 2508 Guardian Building, Detroit, Michigan, Attorney for the respondent, National Casualty Company.

PROCEEDINGS

COLLOQUY RE EXHIBITS, ETC.

Trial Examiner Hier: Are counsel ready?

Mr. Brookfield: I am ready. Mr. Examiner, this is Mr. John F. Langs.

Trial Examiner Hier: I take it, Mr. Langs, that you are familiar with administrative procedure generally and the Federal Trade Commission specifically.

Mr. Langs: I believe I am.

Trial Examiner Hier: I will say this, however, unless [fol. 21] there is some strenuous objection from counsel on either side, to avoid the necessity of taking specific exceptions each time, which does nothing but make the reporter rich, you will have an automatic exception, both sides, to everything I say or do in this case. Is that agreeable?

Mr. Langs: That's agreeable. I was going to ask whether or not we could have that understanding.

Trial Examiner Hier: Yes. Anything that's on the record in this case or anything that you ask me to put on the record which occurs off the record, I will be glad to do so.

Very well, Mr. Brookfield.

Mr. Langs: May I, before the commencement of this particular proceeding, ask that we put in the record, in the first paragraph of the Answer which respondent has filed, we set forth a question of jurisdiction.

Trial Examiner Hier: All right.

Mr. Langs: And I would like to, at this time, urge the question of jurisdiction as far as this particular proceeding is concerned.

Trial Examiner Hier: Well, Mr. Langs, I have gone through the legislative history of this Public Law 15. I have studied the Law and I have seen a number of recent cases pending down there and I don't see how I can possibly determine jurisdiction in this type of case until I get some facts. There is affirmatively alleged here facts which in connection with the laws of each state, the proponents claim establish the jurisdiction; namely, that state laws do not regulate the practices claimed herein. I don't see how that can be determined on contradictory assertions by counsel. [fol. 22] I can't. So I have to get some facts first. It's their burden to prove the jurisdiction naturally. It's no burden on you to disprove it. They will have to show me in each instance that in each state, the particular state law does not regulate either directly or by clear inference the practices alleged in this complaint. It's quite a burden, I might say.

I might say to you, gentlemen, also, I am convinced from reading the legislative history of this Act, that if there is a grant of power by the legislature, for my purposes that would be sufficient. I will not go into the question of how

that power is exercised, used or enforced. If you inquire into nonfeasance, misfeasance and malfeasance of each state insurance commissioner, we'd run this case forever and never get anywhere with it. So if there's a grant of power and that power or that legislative act covers the practices alleged in this complaint, that state is out so far as this case is concerned.

Now, I leave the door open for you to convince me that I am wrong, but Senator McCarran's remarks at the time this bill was up for passage in the 79th Congress, it seems to me were very clear.

Yes, Mr. Langs.

Mr. Langs: If I might just for the purpose of the record, so that you will understand what our position is in the beginning, pursuant to the adoption of Public Law 15, Michigan adopted in 1947, thereafter amended in 1949, and adopted Public Act Number 228 of the Public Acts of 1949, which law was adopted pursuant to and as part of the McCarran Act, Public Law 15, and I would like to read into the record just a few short sections to indicate the full and complete tieup between the Michigan Insurance Code as [fol. 23] it was adopted pursuant to Public Act—Public Law 15.

Trial Examiner Hier: That's the model code, so-called?

Mr. Langs: This is a model code, so-called, subject to certain slight variations in this particular state, and I read from our Michigan State Statutes Annotated, Volume 17, the supplement thereof, Section 24.567 (71). That is the official Statute Book for the State of Michigan and it reads as follows: Section 1, the purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress, as amended) by defining or by providing for the determination of (under standards or procedures herein prescribed) all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Then Section 2 sets forth the definition of person or insurer and of the Commissioner. The Comisisoner shall mean the Commissioner of Insurance of this state.

Section 3 of the Act reads as follows: No person shall engage in this state in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Section 4 of the Act reads as follows: The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. A. Making, issuing, circulating or causing to be made, [fol. 24] issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends, or share of the surplus to be received thereon or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies or making any misleading representation or any misrepresentation as to the financial condition of an insurer or as to the legal reserve system upon which any life insurer operates or using any name or title of any policy or class of policies misrepresenting the true nature thereof or making any misrepresentation to any policy holder insured in any company for the purpose of inducing or tending to induce such policy holder to lapse, forfeit or surrender his insurance.

B. Making, publishing, disseminating, circulating or placing before the public or causing directly or indirectly to be made, published, disseminated, circulated or placed before the public in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster or over any radio station or in any other way an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading.

C. Making, publishing, disseminating, or circulating, directly or indirectly or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral, or written statements or any pamphlets, circulars, [fol. 25] articles or literature which is false or maliciously critical of or derogatory to the financial condition of an

insurer and which is calculated to injure any person engaged in the business of insurance.

D. Entering into any agreement to commit or by any concerted action committing any action of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance.

E. Filing with any supervisory or other public official or making, publishing, disseminating, circulating or delivering to any person or placing before the public or causing directly or indirectly to be made, published, disseminated, circulated, delivered to any person or placed before the public, any false statement of financial condition of any insurer with intent to deceive.

F. Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs or any public official to whom such insurer is required by law to report or who has authority by law to examine into its condition or into any of its affairs or with like intent wilfully omitting to make a true entry of any material fact pertaining to the busines of such insurer in any book, report or statement of such insurer.

G. Issuing or delivering or permitting agents, officers, or employees to issue or deliver agency company stock or other capital stock or benefits, certificates or shares in any common law corporation or securities of any special or ad-
[fol. 26] visory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

H. Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon or in any other of the terms and conditions of such contract.

I. Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium membership policy fees or rates charged for any policy or contract of accident or health insurance applicable to individual or family expense coverage or in the benefits payable thereunder or

in any of the terms or conditions of such contract or in any other manner whatsoever.

J. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance or agreement as to such contract, other than as plainly expressed in the contract issued thereon or paying or allowing or giving or offering to pay, allow or give, directly or indirectly as inducement to such insurance or annuity, any rebate of premiums payable on the contract or any special favor or advantage in the dividends or other benefits thereon or any valuable consideration or inducement whatever not specified in the contract or giving or selling or purchasing or offering to give sell or purchase as inducement to such insurance or annuity or in connection therewith any stock, bonds, or other securities of any insurance [fol. 27] company or other corporation, association or partnership or any dividends or profits accrued thereon or anything of value whatever not specified in the contract.

Now, that is it. I wanted to get this in the record because it forms a basis for our position on jurisdiction. Then Section 6 of the Act provides this. The enumeration in this chapter of powers vested in the Commissioner, or of specific unfair methods of competition and unfair or deceptive acts and practices in the business of insurance is not exclusive or restricted or intended to limit the powers of the Commissioner or any court of review, but the provisions of this chapter are in all respects cumulative of and supplemental to the insurance code and all other applicable Michigan Statutes or common law.

And Section 7 makes this proviso. Upon probable cause, the Commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competiton or in any unfair or deceptive act or practice prohibited by Section 3 of this chapter.

Then the next Section, Section 8, provides what the Commissioner can do with reference to correcting the act complained of if he finds it upon investigation.

Section 9, A, provides that the Commissioner can issue

a cease and desist order. And Section 10 provides for method of review.

Section 11 covers undefined unfair methods of competition, and provides for violation of—Section 13, rather, provides for the violation of cease and desist orders and [fol. 28] the penalties which the Commissioner can impose.

Now, this particular Act was adopted pursuant to Public Law 15, which is found in the U.S. Code, Annotated, Sections 1011 to 1015, and I might also call attention to some recent cases, the case of American Universal Insurance Company vs. Sterling, 203 Federal Second 159; and the case of the North Little Rock Transportation Company vs. Casualty Reciprocal Exchange, 181 Federal Second 174, certiorari denied, 71 Supreme Court 56, 340 U.S. 823, 95, L.Ed. 604. In these cases, it was held that the right in the state, if the state has acted to control the insurance companies, that have their home office within their boundaries, that they have that right. Congress intended that they should have that right and that it is their right and their right alone. That forms the basis of our principal objections to the question of jurisdiction.

Trial Examiner Hier: Let me see if I have this accurately stated in my own language, if you agree with me. First of all, you claim because of the very complete, detailed act, which you have just read into the record, the Federal Trade Commission, in fact, the Federal Government and any of its agencies, has no jurisdiction whatsoever over the insurance business in Michigan, because Michigan has preempted the field and that would hold true in any other state with a similar act. That's the first point, isn't it?

Mr. Langs: No, I will go beyond that.

Trial Examiner Hier: I know you have a second point. The second point is, since your home office is in Michigan and your affairs are subject to regulation by the Insurance [fol. 29] Commissioner of Michigan in all details that it doesn't make any difference what you do in Mississippi, the Insurance Commisisoner here has exclusive jurisdiction over what you do in other states and the Federal Government has none. Isn't that the gist of what you are claiming?

Mr. Langs: That is correct. The insurance department of this state will not permit a company that is subject to its control to engage in lawful practices in Michigan and en-

gage in fraud and dishonest acts elsewhere. They are still the acts of this company in Michigan. Its home office is here and the Insurance Commissioner is of that opinion, that he has jurisdiction to control the acts of the insurance company wherever they may be because it's not within the purview of the law that you can be half honest and half dishonest and the company, as long as it is within his control, must abide by the rules and regulations which they believe to be honest and honorable in the activities of insurance and the cases which I have just cited; certainly the background of the McCarran Act, clearly indicates, in my opinion, that that was intended.

Trial Examiner Hier: Well, these gentlemen over here haven't said so, but I apprehend one of their points and one of their questions is, do you think a state like the State of Mississippi, where there is no regulation of any sort, you disseminate something in Mississippi. Some of the Mississippi residents think it's false and deceptive. Now, the Insurance Commissioner of Michigan does not think so. Who is going to resolve the difficulty? I suspect that's what is back of their position over here. At any rate, Mr. Langs, [fol. 30] I will not attempt to rule on jurisdiction until they have had a chance to show that they have got it; namely, when they rest. At the time they rest, you make any motions you wish on that point and as far as I am concerned, at my level, I will dispose of the jurisdictional question then.

Mr. Langs: All right. I would like to bring into the record two other points, for the purpose of preserving them for future basis of argument and motions on jurisdiction. In analyzing the Federal Trade Commission Act and particularly Section 12 of the Act, I believe it is Section 12,——

Trial Examiner Hier: That's the dissemination act, isn't it?

Mr. Langs: Yes, that's the Section under which this case is tried. This Section provides that it shall be unlawful to disseminate or cause to be disseminated any false advertisement and then it proceeds to define in what way those—the items which should be covered, and it refers specifically to food, drugs, devices or cosmetics and Section 14,—15, rather, defines the term of false advertisement and it again gives food, drugs, devices and cosmetics and I raise the

point that under this particular section of the Federal Trade Commission law, that the question of insurance is not within the definition of—therein found. I would also like to raise the question that in the event that there is to be a question here of dissemination through the mail, which is one of the allegations in the complaint, that the matter would be one for the postal authorities, rather than the Federal Trade Commission. Then a further comment. At the time that the material was requested in this case, last [fol. 31] year, sometime, by the Federal Trade Commission, when they wrote to the National Casualty Company and asked them for material, policies and advertisements and circulars and things which they were disseminating in the form of advertising, it was indicated to them at that time that they wanted this material for the purpose of engaging in a discussion with the company and that they would engage in a discussion with the company. The next thing they heard was the issuance of a complaint and we object to that, not on legal grounds, but certainly on ethical grounds, that they should not have acted in that manner.

I think that represents the basis of our position on jurisdiction and we will urge that at this time and also at the conclusion of the case.

Trial Examiner Hier: So far as the last point goes, Mr. Langs, I take it you understand that I have absolutely no authority over the administrative processes of the Commission. Once the complaint is I ought, it's assigned in rotation to a hearing examiner. I get my share of them and that's the end of them. I can't control anybody on the administrative side except when they appear as counsel in a case. That's the only control I have. If they have abused their discretion, it is a matter which has to be taken up with the Chairman of the Commission. I couldn't——

Mr. Langs: Well, I simply feel that it is something that ought to be put in the record to indicate that where the matter was sent and was intended for one purpose, expected to receive certain treatment and then received another, we just object to that and we'd like to note that in the record.

[fol. 32] Trial Examiner Hier: All right, sir.

Trial Examiner Hier: On the record. Counsel for respondent has produced, as previously indicated, each of the blank forms of contracts issued by the respondent which

are enumerated in the second paragraph, Paragraph Two of the Complaint, together with the advertising pertinent to each and at the request of counsel in support of the Complaint, they have been numbered as follows:

Commission's Exhibit 1, Form No. 950-3G, on which there is no advertising.

Commission's Exhibit No. 2-A, Form No. 970-3G; 2-B, 2-C, and 2-D are the advertising pertinent thereto.

Commission's Exhibit 3-A, Form No. 8005; 3-B, C, D, is the advertising pertinent thereto.

Commission's Exhibit No. 4-A, blank form 8011-3G; 4-B and C, the advertising pertinent thereto.

Commission's Exhibit 5-A is the blank form 8008; 5-B is the application form therefor.

Commission's Exhibit 6-A is blank form 8010-3G, and 6-B through 6-N is the advertising thereof.

Commission's Exhibit 7 is blank form 429-3G, on which there was no advertising issued.

Commission's Exhibit 8-A is blank form 999-3G and 8-B, C, and D, is the advertising thereon.

Commission's Exhibit 9-A is blank form 968-3G. 9-B, C, D, is the advertising pertinent thereon.

[fol. 33] Commission's Exhibit 10 is blank form N-430, on which there is no advertising.

Commission's Exhibit 11-A is blank form 8020; 11-B through F is the advertising pertinent thereto.

Commission's Exhibit 12-A is blank form 8019; 12-B through F is the advertising pertinent thereto.

Commission's Exhibit 13-A is blank form 8000-3G; 13-B, C, and D is the advertising pertinent thereto.

Commission's Exhibit 14 is blank form 955, on which there is no advertising.

Commission's Exhibit 15-A is blank form 8013 and 15-B through L is the advertising pertinent thereto.

Commission's Exhibit 16-A is blank form 8006; 16-B through G is the advertising pertinent thereto.

Commission's Exhibit 17-A is blank form 8007; 17-B through G is the advertising pertinent thereto.

Commission's Exhibit 18-A is blank form 8014 and 18-B through M is the advertising thereof.

Commission's Exhibit 19-A is blank form 8021; 19-B through D is the advertising that belongs to that form.

Commission's Exhibit 20 is blank form 8018. There is no advertising to that form.

Commission's Exhibit 21-A is blank form 8023, and 21-B is the advertisement which was issued on that form.

There have also been produced here, pursuant to the [fol. 34] subpoena, a tabulation of the amount of premiums paid in the policies in force, on each one of these contract forms for the years 1953 and 1954. And there is a sheet for each, except one, of each of the policies for the two years. They have been numbered as follows:

Commission's Exhibit 22 are the premiums and policies issued in 1953 on form number 950.

Commission's Exhibit 23 is the same thing on form number 970. I should say contract number 970.

Commission's Exhibit 24 is an I. B. M. code number for states in order that Commission's Exhibits 25 through 42 may be more easily understood.

Commission's Exhibit 25 is a list of the premiums paid in the policies in force during 1953 on policy number 8005.

Commission's Exhibit 26 is the same thing for policy 8011.

Commission's Exhibit 27 is the same thing for policy number 8008.

Commission's Exhibit 28 is the same thing for policy 8010.

Commission's Exhibit 29 is the same thing for policy 429.

Commission's Exhibit is the same thing for policy number 999.

Commission's Exhibit 31 is the same thing for policy 968.

Commission's Exhibit 32 is the same thing for policy 8020.

Commission's Exhibit 33 is the same thing for policy 8019.

Commission's Exhibit 34 is the same thing for policy number 8000.

[fol. 35] Commission's Exhibit 35 is the same thing for policy number 955.

Commission's Exhibit 36 is the same thing for policy 8013.

Commission's Exhibit 37 is the same thing for policy 8006.

Commission's Exhibit 38 is the same thing for policy number 8007.

Commission's Exhibit 39 is the same thing for policy number 8014.

Commission's Exhibit 40 is the same thing for policy number 8021.

Commission's Exhibit 41 is the same thing for policy number 8018.

Commission's Exhibit 42 is the same thing for policy 8023.

Now, these numbers Commission's Exhibits 22 through 42, inclusive, are all for the year 1953.

There has been marked for identification as Commission's Exhibit 43, a listing of premiums paid and policies in force during 1954, on policy number 950; as Commission's Exhibit 44, on policy number 970; as Commission's Exhibit 45,—45-A and B, on policy number 8005; as Commission's Exhibit 46 is policy number 8011; as Commission's Exhibit 47-A and B, is policy number 8010.

Commission's Exhibit 48 is policy number 429. Commission's Exhibit 49 is policy 999. Commission's Exhibit 50 is policy form 968. Commission's Exhibit 51 is policy form 8020. Commission's Exhibit 52 is policy 8019. Com-[fol. 36] mission's Exhibit 53 is policy 8000. Commission's Exhibit 54 is policy 955. Commission's Exhibit 55 is policy 8013. Commission's Exhibit 56-A and B is policy 8006. Commission's 57-A and B is policy form 8007. Commission's Exhibit 58 is policy 8014. Commission's Exhibit 59 is policy form 8021 and Commission's Exhibit 60 is policy 8023.

I understand from the face of these exhibits, Commission's Exhibits 22 through 60 purport to show the premiums and policies in force in each state in which the company had it in those years on those particular policies.

(The papers referred to were marked Commission's Exhibits 1 through 60 for identification.)

Trial Examiner Hier: Now, there is one list of premiums paid and policies in force in 1953 and 1954 which is missing and that is on policy number what?

Mr. Brookfield: Number 10.

Trial Examiner Hier: You mean Exhibit No. 10?

Mr. Brookfield: Exhibit No. 10, policy number N-430.

Trial Examiner Hier: Now, I understand from counsel for the respondent that that is because there were no policies of that number in force and effect during those two years, so far as you know.

Mr. Langs: Yes, so far as we know, there was none sold and no premiums received.

Trial Examiner Hier: All right, sir. I presume you offer these in evidence?

Mr. Brookfield: Mr. Examiner, I offer the exhibits from [fol. 37] 1 to 60 in evidence, for the purpose for which it has been shown as being the exhibits which you have read off. I think Mr. Counsel for the respondent will so stipulate and admit they may be received in evidence.

Mr. Langs: I will stipulate that they are true and correct records from the company. However, from the standpoint of the question of jurisdiction and the right of this Commission to hear, I would object upon that basis, that they are not properly admitted.

Trial Examiner Hier: Except for the jurisdictional point though, you have no other objection?

Mr. Langs: I have no other objection.

Trial Examiner Hier: That objection, of course, is overruled until we get to the end of this government case and these Exhibits 1 through 60 are admitted into evidence.

P. G. Korn, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Hier: Let me have your name, sir.

The Witness: P. G. Korn, K-o-r-n.

Trial Examiner Hier: Go ahead.

Direct examination.

By Mr. Brookfield:

Q. You are Mr. Korn?

A. That's right.

Q. You have given your name and address on the record?

[fol. 38] P. G. Korn.

A. P. G. Korn.

Q. By whom are you employed, Mr. Korn?

A. National Casualty Company.

Q. What is your position with the National Casualty Company?

A. Executive Vice President.

Q. What are your duties as executive vice president?

A. Primarily administrative.

Q. The National Casualty Company is a corporation?

A. That's right.

Q. Under the laws of the State of?

A. Michigan.

Q. Michigan. How old is the company?

A. About fifty years. I don't know the exact date of incorporation, it was 1903 or '04.

Q. It is a stock company?

A. Right.

Q. What business is the National Casualty Company authorized to conduct?

A. The business of insurance.

Q. Does this include health and accident insurance?

A. Yes, sir.

Q. Does it include any other type of insurance?

A. All casualty—miscellaneous casualty lines.

Q. Are the activities of the health and accident depart-
[fol. 39] ment separate from the other departments?

A. Just to the degree of operation, yes.

Q. In how many states—or, rather, where is the company licensed to do business?

A. In all the states and the District of Columbia and Territory of Hawaii.

Trial Examiner Hier: Licensed by whom? Those states?

The Witness: By those respective states.

Q. (By Mr. Brookfield) The home office is in Detroit, Michigan?

A. Detroit.

Q. You are the vice president in charge of the accident and health?

A. That's right.

Q. So that all of the accident and health policies in which we are interested and activities are under your general direction?

A. Right.

Q. Mr. Korn, do you know how many employees the National Casualty has?

A. I can give you an approximate figure, around a hundred eighty-five and a hundred ninety.

Q. That is local employees?

A. Right.

Q. How many agencies do you have?

A. Well, it's usually two categories, direct reporting agency, approximately three hundred and fifty to four [fol. 40] hundred. And then sub-agents may number into —I am not certain of that figure, possibly Mr. Matthews may be able to give it to you.

Q. Mr. Matthews also has charge of the agency department?

A. That's right.

Q. Do these same agencies sell both your casualty and your health and accident?

A. No, the majority of them don't. There may be one or two recently that do, but not as a general rule, no.

Q. So that when you are referring to these agencies, you are referring to the accident and health agency, rather than a casualty agency?

A. Right.

Q. These agencies, I suppose, are located in every state where you are licensed to do business?

A. Right.

Q. Mr. Korn, do you know what, in rough figures, what the total volume of business in accident and health policies for 1953 was? That is, the total volume done by your company.

A. Are you asking for this individual business or the company, as a whole?

Q. The company roughly as a whole.

A. Approximately sixteen million.

Trial Examiner Hier: For accident and health only?

The witness: That's right.

Q. (By Mr. Brookfield) And in 1954?

A. It might be somewhat higher than that, the figures are available.

[fol. 41] Q. Would the report which I asked about show that?

A. The annual statement, yes, sir.

Q. Will you furnish us with such a report without a subpoena for it?

A. I believe so, if attorney advises to.

Q. Mr. Korn, are all the company's policies issued by the home office?

A. Not all.

Q. How do you distinguish whether or not they would be issued by the home office?

A. There are a few states that have the authority to issue policies. I don't know exactly what the percentage is, but it is a relatively small percentage.

Q. That the agents in those few states, the agents themselves can issue policies?

A. Not in a particular state, but by agency.

Q. Well, what proportion would you say of all the company's policies are issued at the home office?

A. I would say possibly eighty percent.

Q. Eighty.

A. I believe so. That's a relative figure.

Q. Does the home office mail the premium notices or how are they mailed to the policy holders?

A. Not in all instances. They may in a few cases.

Q. How are the premium notices generally handled?

A. By the agent.

[fol. 42] Q. Do the agents in all cases keep track of their particular premium holders, irrespective of whether they move out of their area or not?

A. I don't understand that question.

Q. Where a policy holder moves out, that the agent has sold a policy to, moves out of that area, say, into another state, would the agent still continue to bill him?

A. He may still collect it and he may permit that policy holder to pay his premium through another agent in an immediate locality. That shifts back and forth.

Q. Is all of the premiums turned into the company or the large portion of it turned into the company by the agent?

A. Right.

Q. Rather than by the policy holders?

A. Right.

Q. How high would you say that proportion would be?

A. Oh, I would say at the present time possibly ninety, ninety-five percent of the premiums.

Trial Examiner Hier: How long does the agent who wrote the policy continue to get a part of the premium paid in?

The Witness: As long as he services the work. No definite time. As long as he services that business.

Trial Examiner Hier: As long as he handles the account?

The Witness: That's right.

[fol. 43] Trial Examiner Hier: He still gets pa[illegible] of the premium?

The Witness: That's right.

Cross-examination.

By Mr. Langs:

Q. Mr. Korn, how long have you been in the insurance business?

A. Thirty years.

Q. And during that time what type of insurance have you been principally engaged in?

A. Accident and health insurance.

Q. And how many years has the National Casualty Company been in business?

A. Fifty years, I believe, fifty-one years.

Mr. Langs: I will reserve any further questioning until later.

[fol. 44] L. P. Matthews was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Hier: What is your name?

The Witness: L. P. Matthews.

Direct examination.

By Mr. Brookfield:

Q. Your name is L. P. Matthews?

A. That's correct.

Q. You are assistant secretary of the National Casualty Company?

A. And director of agencies.

Q. And director of agencies. What are your duties as director of agencies, Mr. Matthews?

A. Well, as director of agencies, the agency department is in charge of production of our individual accident, health

and individual and hospital family policies and I supervise production, supervise the servicing of the agents that we have, appoint new agents, either through correspondence or personal contact, supervise and engage in field work and, of course, engage in handling the routine problems of the agents that we have. We also handle to a great degree the advertising of the individual accident and health and individual family and hospital policies.

Trial Examiner Hier: You have nothing to do with casualty?

The Witness: Nothing.

Q. (By Mr. Brookfield) When you say "individual", you [fol. 45] are referring referring now to as an individual as distinguished from group accident?

A. An individual.

Q. But include family group?

A. That's right.

Q. How are these agencies set up, Mr. Matthews? Are they set up as independent agencies or, I mean, are they paid employees of the company or contract or how are these various agencies set up?

A. They are all independent contractors, not under salary to the company.

Q. How are they hired? How is contact made with them?

A. Well, that could occur in various ways. They might answer an advertisement that we inserted in a trade publication. They might have been referred to us by one of our own agents with whom they were friendly; in some cases, they contact the insurance department of their state and we are recommended as one of the companies that they could be privileged to represent. At other times, we might have some possible agent referred to us and we might write to him. And those are about the main ways that we are contacted.

Q. Would they apply to the salesmen? Do you distinguish between the agents and the salesmen?

A. Well, of course, our agents sell, but we don't refer to them as salesmen. They are agents who must be properly licensed by the insurance department of the state in which they engage in their business and certain agents are under contract as independent contractors.

Q. And they, in turn, have salesmen who sell the policies?

[fol. 46] A. Those agents who are under direct contract have the privilege, subject to company consent, of appointing what is called a sub-agent who operates through that direct agent.

Q. Who is it that makes the contact, the contact with the member of the public to whom a policy is to be sold and who negotiates the sale of the policies? Is it the sub-agent or sub under them, salesmen, or who? That is what I am trying to find out.

A. It could be either the direct agent on a contract with us or a sub-agent whom he has licensed to represent the company.

Q. Does the company conduct any training school for these agents or give them any training?

A. Our policy has been that we do not appoint or put any agent under contract unless he is experienced in the accident and health business.

Trial Examiner Hier: As a matter of fact, most of these agents handle other lines of insurance too, don't they?

The Witness: Some of them are what you might call general insurance agents handling casualty, fire, life, and they have a general knowledge of insurance.

Q. (By Mr. Brookfield) Do they represent other companies besides yours?

A. Mostly, yes.

Q. You are confining all your answers now to accident and health and eliminating casualty?

A. Definitely, I am eliminating casualty from everything.

[fol. 47] Q. Absolutely. How many agencies, do you have under your direction?

A. I would say about three hundred and fifty to four hundred.

Q. And they, in turn, have other sub-agents?

A. That is correct.

Q. The sub-agents are not responsible to you; they are responsible to the agencies, is that correct?

A. Not entirely. As agents of the company, they are also responsible to the company, but they transact their business through the agents who appointed them.

Q. How are these agents compensated?

A. Strictly through commission.

Q. Mr. Matthews, for the purpose of the record, could you take a typical sale of a policy through the various steps in which it is handled from the time the contact is made with the respondent all the way through the time it is processed in the home office?

A. You mean the procedure that is followed?

Q. Yes, the procedure.

A. Well, I would say that the procedure followed in most cases, the agent procures the signed application and forwards it to the home office direct if he's a direct reporting agent under contract and doesn't have the policy issuing privilege. In those cases, we receive the application, the home office, and the home office issues the policy and returns it to the agent for delivery to the insured. Now, in the case of what we have termed sub-agents, when they take an [fol. 48] application, they turn it in to their direct agent through whom they are reporting, who, in turn, follows the procedure I have mentioned.

Q. The policy is mailed to the—the application, rather, is mailed to the home office and the home office fills in the blanks in one of the policies, whichever policy the application calls for, or is that done by the agent?

A. What do you mean, filling in the blanks?

Q. Well, the name of the insured and the——

A. That's all completed in the presence of the applicant by the agent or the applicant completes it himself.

Q. Both on the application and the policy itself?

A. No, the policy is completed and typed in the home office or by an agent, if he has the policy issuing privilege.

Q. And then the policy is mailed from the home office in Detroit to the agent who has sold it for delivery to the applicant?

A. To the policy holder at that time.

Q. And that is the way that the great majority of your cases are handled throughout the United States?

A. I would say so, other than where an agent has a policy issuing privilege; then he issues the policy himself.

Q. Approximately how many of your agents would have such a policy issuing privilege?

A. Well, I would hesitate to approximate that. It is not a large percentage, however.

Trial Examiner Hier: Mostly in the large cities?

[fol. 49] The Witness: Mostly in the large cities or in states so distant from the home office that it would take time and delay in the delivery of the policy.

Q. (By Mr. Brookfield) Well, now, does—do these agents when the issue these policies, do they make a report to the home office on the policy or they have a form to show what they have sold?

A. We are dealing somewhat, if I may say so, with underwriting procedure which is somewhat outside the realm of my department. However, I can naturally say that the policy issuing agent sends the original application from which the policy has been issued to the home office and such papers, such as investigation and so forth as should go with it, for our home office files.

Q. And they are kept in the home office files during the pendency or life of the policy?

A. And reviewed by our underwriting department.

Trial Examiner Hier: Reviewed with the privilege of veto?

The Witness: That would depend upon the policy provisions and the—whether the premium has been paid with the application.

Trial Examiner Hier: No, I mean does the home office have the privilege of turning down any policy that was issued by your policy issuing agent in Los Angeles, say?

The Witness: Yes.

Trial Examiner Hier: It does have that privilege?

The Witness: Yes.

[fol. 50] Q. (By Mr. Brookfield) Now, Mr. Matthews, does the home office, that is the Detroit office, furnish the agents with leads?

A. Do we furnish the agents with leads?

Q. Does the home office?

A. No, sir, we do not.

Q. You don't do any direct mail advertising that results in leads being furnished?

A. When you said, do we furnish leads, I took that to mean the general practice of some companies who handle their own direct mail and get the leads in the home office

and then distribute them to various agents' territories. We don't engage in that procedure.

Q. How is your advertising for the purpose of obtaining leads handled?

A. The vast majority of our direct mail is sent when requested and under certain conditions to the agent and the agent gets it out.

Trial Examiner Hier: You said the vast majority. Do you do any direct mail advertising?

The Witness: Not as a company. We have on occasion on behalf of some agents who have asked us to utilize direct mail facilities of Detroit because they didn't have such local facilities available.

Trial Examiner Hier: Now, in that direct mail advertising, that goes out at the request of that particular agent. What address is on that? The home office address or the local agent?

The Witness: That would depend on the manner in which the agent had requested it to be so addressed, either back to us or to him.

[fol. 51] Q. (By Mr. Brookfield) Well, if he has requested that those leads, that the replies, rather, be sent back to you, then those replies are segregated and mailed to him, are they?

A. That's right.

Trial Examiner Hier: It seems to me, Mr. Brookfield, that it's important to get the percentage or amount or some indication how substantial this practice is. Could you tell us, Mr. Matthews?

The Witness: You mean as between our mail?

Trial Examiner Hier: This direct mailing, the substantiality of this direct mailing that you do.

The Witness: Well, in the over-all picture, I would say we do not do very much.

Trial Examiner Hier: Ten percent? Fifteen percent?

The Witness: Of the general over-all direct mailing?

Trial Examiner Hier: No, of solicitation by mail when the agent is mailing it out, or the home office is mailing it out. Direct, consumer, prospective insurance mailings. Do you do ten percent of it from Detroit and the agents do the rest in their local addresses or fifteen percent or what?

The Witness: Well, I would say that it was less than five percent.

Trial Examiner Hier: Less than five, O.K.

Q. (By Mr. Brookfield) Mr. Matthews, in that connection, five percent of all the mail that—the advertising is done by the company and its agents, is that what you mean, is handled by the home office?

A. Well, as I answered Mr. Hier's question, my understanding was that of all the direct mail that was disseminated on company material, how much went out of Detroit [fol. 52] and how much did the agent get out and I would say that we handled for the agent less than five percent of such dissemination.

Q. Now, to what extent does the company send to the agent for their distribution literature prepared under the —at the company headquarters at your direction? What would be the volume of that?

A. You mean the quantity?

Q. Yes.

A. Well, I would have to consult the records on that. I think we have them available.

Q. Do you have the records available?

Trial Examiner Hier: He says he thinks so.

Mr. Brookfield: Sir?

Trial Examiner Hier: He says he thinks so.

The Witness: Thank you, Mr. Langs. Now, would you like me to give you these by form?

Q. (By Mr. Brookfield) Yes.

A. We have a direct mailing card form 2186. Between the period March 11, '53, to December 31, '53, we distributed to agents not less than five percent of the home office grand total of 84,100 pieces which went into nine states only. The largest distribution being in Michigan, 35,000.

Q. In that connection, does your record show how many of these went into the District of Columbia? Do you have it listed?

A. Two thousand.

[fol. 53] Q. Will you continue now with the next form?

A. The same form, 2186 from January 1, 1954, to January 19, '55, 42,300. None into D. C.

Q. Beg pardon?

A. None went into the District of Columbia.

Q. Did they go into the states listed on this compilation you prepared?

A. Well, that would be matter of matching them up.

Q. Will you read the list of states then?

A. This is January 1. Do you want me to go back to March 11, '53?

Q. Yes, both, please.

A. March 11, '53, to December 31, '53, District of Columbia, Florida, Indiana, Michigan, New York, Ohio, Oklahoma, Pennsylvania, Wisconsin. January 1, '54, to January 19, '55, Alabama, Kansas, Kentucky, Michigan, Minnesota, New Hampshire, New York and Pennsylvania. Some of those may be duplications.

Q. Now, the next form.

A. 2125A, March 11, '53, to December 31, '53, 46,000, into the states, District of Columbia, Florida, Georgia, Illinois, Michigan, New Jersey, New York, North Carolina, Ohio, Tennessee, Wisconsin. From January 1, '54, to October 8, '54, 38,250, Alabama, Iowa, Nebraska, New Hampshire, Ohio; 2191—

Q. That's your next form?

A. That's right.

Q. Go ahead.

[fol. 54] A. From March 11, '53, to December 31, '53, 91,100 to the states of Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee. January 1, '54, to November 29, '54, 55,250, Alabama, Florida, Kansas, Michigan, New Hampshire, New York, Ohio, Tennessee; LPM/G letter, March 11, '53, to December 31, '53, 108,500, Colorado, Michigan, New Jersey, Ohio, Pennsylvania, Virginia, Wisconsin. January 1, '54, to November 8, '54, 40,050, Alabama, Indiana, Kentucky, Michigan, Nebraska, New Hampshire, Ohio, Pennsylvania, Virginia, Wisconsin. LPM/D letter, March 11, '53, to December 31, '53, 32,700, Florida, Illinois, Kentucky, Michigan, North Carolina, Ohio, Pennsylvania, Wisconsin. January 1, '54, to March 4, '55, 29,000, Alabama, Indiana, Iowa, Kentucky, Massachusetts, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Tennessee; LPM/H, March 11, 1953, to December 31, '53, 64,950, California, Colorado, Florida, Georgia, Idaho, Indiana,

Kentucky, Michigan, New York, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, Wisconsin. January 1, '54, to March 11, '55, 89,100, Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Tennessee, Wisconsin; 2196, March 11, '53, to December 31, '53, 20,000. Indiana, Iowa, Michigan, Ohio, Pennsylvania, Wisconsin. January 1, '54, to March 11, '55, 5,000, Arkansas, Florida, Wisconsin. 2221, February 27, '54, to January 31, '55, 61,600, Florida, Georgia, Iowa, Kansas, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Virginia, Wisconsin. HV letter, March 11, '53, to June 1, '53, 40,-[fol. 55] 000, Connecticut. JTK letter, March 11, '53, to October 19, '53, 10,000, Missouri and Kansas. MB #1, 7-1-53 to 12-28-53, 207,987, Pennsylvania, Delaware, New Jersey. August 2, '54, to March 11, '55, 136,000, Wisconsin. MB #2, December 29, '53 to—this must be a misstatement, or rather typographical error, it says from December 29, '53, to December 31, '53, which is only three days, 35,000.

Q. Is that MB #2?

A. Yes.

Mr. King: We have to 6-16-54.

The Witness: That would probably be it. This is a typographical error. January 1, '54 to June 16, '54, 152,820, Pennsylvania. MB #3, June 23, '54, to November 24, '54, 250,000, Pennsylvania, Delaware and New Jersey. MB #4, December 1, '54, to March 11, '55, 131,000, Pennsylvania, Delaware, New Jersey.

Trial Examiner Hier: Mr. Brookfield, are you going to put all these MB #2's and 4's and JTK's in this record?

Mr. Brookfield: Mr. Examiner. when Mr. Matthews reads this list, I might say, sir, that all the MB's and so forth are already in the record.

Trial Examiner Hier: Oh, they are in the record.

Mr. Brookfield: They are in the record already.

Trial Examiner Hier: Certainly not under that title.

Mr. Brookfield: This advertising letters—I mean the advertising is all listed.

Trial Examiner Hier: They are in these contracts?

[fol. 56] The Witness: Yes.

Trial Examiner Hier: In other words, it's printed on the face of it? I can find it that way. Very well.

Q. (By Mr. Brookfield) Is that your list?

A. That completes the printed direct mail.

Trial Examiner Hier: I have already interrupted once. I might as well ask you another question on my mind. You send these MB number 2's out, 35,000 lots to your agent in Wisconsin, for instance, does he buy a mailing list from the—a selected mailing list of certain income brackets, or what does he do with these?

The Witness: I would say that generally speaking they use the telephone directories, both general and yellow pages.

Trial Examiner Hier: And they mail that stuff out?

The Witness: That's right.

Trial Examiner Hier: And they wait for the results?

The Witness: Yes.

Trial Examiner Hier: Does the company ever furnish the agents with mailing lists?

The Witness: No.

Trial Examiner Hier: Go ahead.

Mr. Brookfield: Mr. Examiner, I ask that this list which shows the various advertising which is on the record now —and also this list refers to the numbers of the various pieces of advertising and the policies which they advertise, and we have compared them with Mr. Matthew's—that this list be given an exhibit number.

[fol. 57] Trial Examiner Hier: Very well. That will be Commission's Exhibit 61-A, B, C and D.

(The paper referred to was marked Commission's Exhibit 61-A, B, C and D for identification.)

Mr. Langs: May I have the same objection as previously?

Trial Examiner Hier: The record may show that you have a continuing objection, sir, to everything and anything that's been going on in this case since we started, on the jurisdictional ground that you have mentioned. I don't think myself it's necessary to reserve jurisdictional points, but if you wish to do so, it's perfectly all right with me.

Mr. Langs: Thank you.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Q. (By Mr. Brookfield) Mr. Matthews, will you examine Commission's Exhibit 61-A to D. Are you familiar with that exhibit?

A. I am.

Q. Was that exhibit prepared under your direction?

A. It was.

Q. Will you explain to his Honor what it is.

A. This is a list of advertising material which either by exact cited phraseology or what we though was of similar import, should be submitted today, together with the period during which it was disseminated and the territory into which it was disseminated.

[fol. 58] Q. That is the list of the advertising which you have submitted with the policies today?

A. Yes, sir.

Mr. Brookfield: I ask that it be received in evidence.

Trial Examiner Hier: Anything but the usual objection?

Mr. Langs: Nothing but the usual objection.

Trial Examiner Hier: That objection is overruled. The document 61-A to D is admitted in evidence.

(The paper referred to, heretofore marked for identification Commission's Exhibit 61-A through D, was received in evidence.)

Trial Examiner Hier: These agents of your personally solicit as well as by mail?

The Witness: Definitely.

Trial Examiner Hier: Any substantial degree?

The Witness: Definitely, sir.

Mr. Brookfield: Mr. Examiner, I would for the purpose of saving this witness from having to go through and identify each advertisement in the—which was introduced this morning, I would like to suggest that subject to Mr. Langs' joining in and your approval, that the various numbers called for in Commission's Exhibit 61-A and the letters referred to, shown as Commission's Exhibits—in other words, just make a statement as to what Commission's Exhibits they are.

Trial Examiner Hier: Go ahead.

Mr. Brookfield: The 2149 is the Commission's Exhibit [fol. 59] 3-B; 6625 is Commission's Exhibit 4-B; 2113, Com-

mission's Exhibit 9-D; 2183 is Commission's Exhibit 12-B; 2171 is Commission's Exhibit 6-G. LPM/G is Commission's Exhibit 6-F. 05101, Commission's Exhibit 6-E. 2191 is Commission's Exhibit 12-C. LPM/H is Commission's Exhibit 12-D. 2164 is Commission's Exhibit 6-K. 2125-A, Commission's Exhibit 8-B. 2159, Commission's Exhibit 8-C. 2196, Commission's Exhibit 19-B. 2192, Commission's Exhibit 19-C. 2136, Commission's Exhibit 13-B. 2153, Commission's Exhibit 15-B. JTK, that's a form letter, Commission's Exhibit 15-G. HR, Commission's Exhibit 15-H. LPM/D, Commission's Exhibit 15-E. And the news mat, Commission's Exhibit 15-I.

Trial Examiner Hier: On request of counsel, I have marked a number of forms here as follows: Commission's Exhibit 62 is what the witness designates as a handout form 8023. Commission's Exhibit 63 is a form letter known to the respondent as circular letter LS #2. Commission's Exhibit 64 is a direct mail letter designated as RW #1. Commission's Exhibit 65 is a form letter designated LS #1. Commission's Exhibit 66 is a form letter designated MB #4. Commission's Exhibit 67 is designated MB #3. Commission's Exhibit 68 is form number 2221. Commission's Exhibit 69 is designated as HR. And Commission's Exhibit 70 is a newspaper mat.

(The papers referred to were marked Commission's Exhibits 62 through 70 for identification.)

Trial Examiner Hier: Exhibits 62 through 69 tie into Exhibit 61-A, B, C and D.

[fol. 60] I assume you offer those?

Mr. Brookfield: I offer them in evidence.

Trial Examiner Hier: He's already identified them.

Mr. Brookfield: I ask they be received in evidence.

Trial Examiner Hier. Mr. Langs?

Mr. Langs: Usual objection.

Trial Examiner Hier: All right. The objection is overruled. The documents 62 through 70 are admitted in evidence.

(The papers referred to, heretofore marked for identification Commission's Exhibits 62 through 70, were received in evidence.)

Q. (By Mr. Brookfield) Mr. Matthews, referring to Commission's Exhibits 62 to 70, this is advertising material that has been used during the period of January 1, 1954 to March 11, 1955?

A. It's been used according to the date stipulated in the list.

Q. And the date of the use and the territory in which it has been used and disseminated is included in Commission's Exhibit 61-A, B, C and D, which is the list?

A. It is.

Trial Examiner Hier: Do you permit your agents to do any of their own advertising over your name?

The Witness: If a copy is submitted to the home office for approval.

Trial Examiner Hier: It has to be submitted?

The Witness: Yes.

[fol. 61] Trial Examiner Hier. They can't do it freely?

The Witness: They are not supposed to.

Q. (By Mr. Brookfield) Mr. Matthews, you have not under the terms of the subpoena submitted all the advertising material that you have used over this period of time, is that correct, but only that which you consider to be covered by the wording of the subpoena?

A. We submitted the material according to the subpoena that was served in that we furnished all material which contained the exact cited phraseology and that which we deemed to contain the same import which was as stated in the subpoena.

Q. So that, so far as the import is concerned, that was—your company officials desired to comply with the subpoena?

A. Most definitely.

Q. But you have used other advertising during this period that was not submitted, is that correct?

A. That's possible, but this is all of the main material. There might be a form letter here and there that was just general, but very little.

Mr. Brookfield: Mr. Examiner, I ask that the form letter LPM/f be marked for identification, together with the postcard which hasn't any——

Trial Examiner Hier: Commission's Exhibit 71-A is a return postcard; 71-B is what Mr. Brookfield designates as a form letter, LPM/f.

(The paper referred to was marked Commission's Exhibit 71-A and 71-B for identification.)

[fol. 62] Q. (By Mr. Brookfield) Mr. Matthews, will you look at Commission's Exhibit 71-A and B and I ask you, are you familiar with that piece of advertising?

A. Yes, sir.

Q. Was that advertising printed and disseminated by your company during the period of March 11, 1953, to March 11, 1955? Or during that period?

A. This letter obviously was in use after March 11 or it wouldn't have been submitted to the Federal Trade Commission, but the actual cut-off date, and this is an obsolete letter, I believe, would be last fall, but the exact date, I don't know.

Q. Fall of?

A. 1954.

Q. Do you know where that letter was disseminated?

A. No, but I could secure that information.

Q. Will you secure that information prior to the time that this hearing adjourns?

Trial Examiner Hier: He means before tomorrow afternoon.

Mr. Langs: Just a moment, I would like to see this.

Mr. Brookfield: Haven't you seen this?

Mr. Langs: No, I have not seen it.

Mr. Brookfield: I am sorry, sir.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

[fol. 63] Trial Examiner Hier: On the record.

Mr. Langs: Well, unless there is some way in which counsel can tie this into the allegations in the complaint, I do not see the materiality of it at all and I think it is rightly omitted; certainly, to the extent of obtaining information on it. We can obtain that if it is material, but I certainly would object to it as it does not come within the statements or the allegations contained in the complaint.

Trial Examiner Hier: That means I better read it. What

contract do you claim this goes to or what group of representations?

The Witness: That pertains——

Trial Examiner Hier: Mr. Brookfield.

Mr. Brookfield: The general—so far as I can see, I can only refer to the contract by the witness's testimony, but as to the allegations, it certainly applies to the general allegations as to the benefits to be received under these various policies.

Trial Examiner Hier: Section 3, you mean?

Mr. Brookfield: Section 3.

Trial Examiner Hier: Paragraph 3.

Mr. Brookfield: Yes. Number 3 under paragraph 3.

Trial Examiner Hier: I know what you mean, yes. It starts out, "the most complete coverage."

Mr. Brookfield: Yes.

Trial Examiner Hier: Mr. Langs, this paragraph 3 is language which is quite typical of Federal Trade Commission pleading; namely, first, there is the general statements [fol. 64] that they have issued, numerous and sundry statements and so on and then it says, typical but not all inclusive are the following; and it's been many times held that doesn't bar the proponent's counsel from offering material which is outside of that which is exemplified but which is along the same line. Of course, he is going to have to show me before he gets through that this reasonably induced—of course, it could be done by inference—the purchase of some one of your policies, that you issued.

Mr. Langs: Well, my objection does not go to the point which your Honor has raised. My objection goes to this point, that wherein do they make any allegation; that in paragraph 3 they have set up certain things which they consider typical. Paragraph 4 and 5 set up the allegation and the charge.

Trial Examiner Hier: Yes.

Mr. Langs: And where in paragraph 4 or 5 is there any charge which would go to any of the statements which are contained in there, even by referring to it as typical? That's what my objection is.

Trial Examiner Hier: I see. I guess I better read 3 over. Well, I don't agree with you there, Mr. Langs. The second paragraph, unnumbered, well that isn't going to identify it

very well. It's designated as paragraph 5 and then you come down to sub-paragraph numbered 3 and then there is a sub-paragraph under that on page 4, in which they raise this general question that what is the matter with your advertising is that you advertise these benefits, but you don't say therein that there's a lot of things that are excluded; insanity, Workmen's Compensation, injuries existing prior, and so forth and so on. This thing, it seems to [fol. 65] me, comes in that same general category. It talks about benefits, but it doesn't say what the exclusions are. That's their argument. That's their complaint.

Mr. Langs: I understand what their complaint is, but I still feel it would be necessary for them to specifically set forth an allegation on this particular item. In other words, they have given to the company certain items which they consider typical of things they want to have covered. We have attempted to do that.

Trial Examiner Hier: Yes.

Mr. Langs: Now, they come in here and they bring in another particular item which was not set up as typical and which is not in any way, so far as we can see, a matter wherein an allegation or a charge would fit that particular situation and because of that, we feel that it should be—it is properly excluded, should be excluded, rather than to require the company to bring in items which are outside the scope of the thing which is charged, and I made my point on it.

Trial Examiner Hier: Yes, I think the charge is broad enough to include this, Mr. Langs, both in paragraph 2 and also in paragraph 5. I don't know what he's going to do with it or how he is going to connect it up. I have to give him the opportunity.

Exhibit 71-A and B, do you want to examine the witness further on it or do you want to offer it in evidence or what?

Mr. Brookfield: I will examine the witness further on it.

Q. (By Mr. Brookfield) Will you look at 71-A and B, Mr. [fol. 66] Matthews, and tell us what policies that application, that advertising, is applicable to, or is intended to further the sale of?

A. This would apply to individual and/or family hospital policies 8013 or 14.

Mr. Brookfield: Your Honor, I ask that the exhibits be received in evidence.

Trial Examiner Hier: All right. We already thrashed that out. The general objection of Mr. Langs is overruled, as well as the specific objection. Commission's Exhibits 71-A and B are admitted.

(The papers referred to, heretofore marked for identification Commission's Exhibit 71-A and 71-B, were received in evidence.)

Q. (By Mr. Brookfield) Mr. Matthews, Commission's Exhibit 71-A and B, is that distributed by the company in the same areas in which those two policies are sold? Or has it been?

A. Not all inclusive, no.

Trial Examiner Hier: You say "those policies." I am afraid that's going to create a misconception in this record. You mean those two types of policies, don't you?

Mr. Brookfield: Yes.

Trial Examiner Hier: You are talking about specific policies.

Mr. Brookfield: The two numbers named by the witness.

Trial Examiner Hier: Two specific numbers.

[fol. 67] Q. (By Mr. Brookfield) What was it?

A. 8013,

Q. And 8014.

Mr. Brookfield: Which specific types of policies are in evidence under Commission's Exhibit numbers.

Trial Examiner Hier: All right.

Q. (By Mr. Brookfield) Do you know what states this advertising has been disseminated in?

A. Not at this time, no.

Q. Will you determine that by tomorrow afternoon? Can you determine it by tomorrow afternoon?

A. I believe so.

Q. Mr. Matthews, how is the conservation program of your company handled? By conservation program I mean premium renewals and keeping the policies in effect. Is that handled by the company or locally by its agents?

A. The collection of premiums is principally in the hands of the agents.

Q. Does the company send out any notices to delinquents or anything like that?

A. Very small percentage.

Q. Beg your pardon?

A. A very small percentage, because the premium collections are in the hands of the agents as part of their duty, you might say, or contractual requirements.

[fol. 68] Q. That is because they receive compensation as long as the renewals start coming in, is that correct?

A. Well, they receive compensation for renewals for which service they collect the renewals and attend to that function.

Q. Under what circumstances would the company collect premiums direct?

A. There are only two circumstances that I can think of at this moment and that is that over the years on occasion a small agent might die or something and there is nobody to carry on the agency and gradually the—rather, not gradually, but due to the fact that there isn't any estate or anyone who can carry on the agency, they simply say, "Will you take care of it from the home office?", which is what you might call a miscellaneous account and the other would be in the case of an agent who might be an individual operating without an office and he would ask us if we would take care of that function for him.

Mr. Brookfield: Mr. Examiner, I ask that premium notice forms, one blue one and one red one, be marked for identification as Commission's Exhibits 72 and 73.

Trial Examiner Hier: No, one number on both of them.

Mr. Brookfield: I think two numbers.

Trial Examiner Heir: All right. Commission's Exhibit 72 is a blue form, blue premium notice, and Commission's Exhibit 73 is a red delinquent premium notice.

(The papers referred to were marked Commission's Exhibits 72 and 73 for identification.)

[fol. 69] Mr. Brookfield: Mr. Langs, do you want to see this?

Mr. Langs: Yes.

Q. (By Mr. Brookfield) Will you examine Commission's Exhibits 72 and 73 for identification. I ask you, are you familiar with those?

A. Yes.

Q. Will you tell his Honor what they are.

A. Form 5190 is a premium notice which is sent out by the agent principally to the policy holder, informing him that his renewal premium is due. Policy form—I mean delinquent premium notice form 5191 is a follow-up which is sent out principally by the agent when the premium has not been paid.

Q. Are those prepared by the home office of the National Casualty Company?

A. You mean are they printed?

Q. Yes.

A. The form is printed by the home office.

Q. And distributed to the agents?

A. Sent to the agents in bulk. The agent types up the notice and sends it out himself.

Mr. Brookfield: I ask they be received in evidence.

Mr. Langs: No objection except the usual objection on it.

Trial Examiner Hier: Objection is overruled. They are received.

(The papers referred to, heretofore marked for identification Commission's Exhibits 72 and 73, were received in [fol. 70] evidence.)

Q. (By Mr. Brookfield) Now, Mr. Matthews, is a charge made for this printed material that is submitted to the agents? For instance, these notices?

A. There is no charge levied upon the agent for these two notices.

Q. I will ask you the same thing, is any charge made for any of the advertising material which you furnish to the agents?

A. That would depend upon certain individual circumstances.

Q. Such as?

A. On occasion there might be a share the cost. On another occasion we might furnish a fairly liberal quantity at home office expense which the agent, however, would send out.

Q. In other words, you would furnish the advertising material and the agency would pay for the cost of distributing it?

A. Yes, but not in all cases. Sometimes we would ask for a share the cost on the material also and then the agent would also assume the entire expense of mailing it out.

Trial Examiner Hier: Let me get this clear. Do you sometimes share the expense in the distribution of that material?

The Witness: On occasion.

Trial Examiner Hier: On occasion.

Q. (By Mr. Brookfield) Do you print any other conservation material besides the premiums renewals?

A. There have been some form letters which have been approved by the home office which agents have gotten up and sent out as follow-ups.

[fol. 71] Q. Do you print those for the agents?

A. Not as a general rule, no. If we did, they would be a multigraph form in fairly small quantities.

Mr. Brookfield: Mr. Examiner, I ask that this form letter of the Sparks Insurance Agency be marked for identification.

Trial Examiner Hier: All right, it is marked Commission's Exhibit 74.

(The paper referred to was marked Commission's Exhibit 74 for identification.)

Q. (By Mr. Brookfield) Mr. Matthews, I show you Commission's Exhibit 74 for identification and I ask you, can you identify that?

A. Identify it in what respect?

Q. That one of the form letters that you referred to a few minutes ago as being typical of those printed for the agents?

A. This could possibly be one. In wouldn't say it was necessarily typical because Mr. Sparks in this case, Sparks Insurance Agency might have had some thoughts of their own which were perfectly satisfactory.

Q. Did you submit this form to the Commission in request of their—last May, when they requested additional material?

A. Well, that I wouldn't know, sir, without going over the material that was submitted originally.

Q. But you have prepared similar mimeographed letters for your agents, is that correct?

A. I would say so, letters of this kind.

Mr. Brookfield: I ask it be received in evidence.

[fol. 72] Mr. Langs: Same objection.

Trial Examiner Hier: Objection overruled. Commission's Exhibit 74 is received in evidence.

(The paper referred to, heretofore marked for identification Commission's Exhibit 74, was received in evidence.)

Q. (By Mr. Brookfield) Would that be handled also on a share the cost basis, that type of material, conservation material?

A. No, I wouldn't say in this particular case, I am not entirely familiar with that form, but I would say that had been multigraphed probably at the home office.

Q. Multigraphed at your office and then sent to—where is that located?

A. Washington, D. C.

Q. Washington, D. C.

Mr. Langs: Might I ask, Mr. Brookfield, did I understand you to say that this form—you used the word multigraphed?

Mr. Brookfield: Isn't that the word? I think the gentleman used the word.

The Witness: Multigraphed.

Mr. Langs: Is this a multigraphed letter?

The Witness: That would be, yes. Whether it was done at the home office or by Mr. Sparks, I am not in a position to state.

Trial Examiner Hier: They are both referring to Exhibit 74.

[fol. 73] Q. (By Mr. Brookfield) Mr. Matthews, for purpose of illustration, referring now to Commission's Exhibit 6-A through 6-N, 6-A is one of your policies, is it not?

A. It is.

Q. And you take the exhibit and show how this advertisement would be—the advertising would be used by the com-

pany and its agents and how the policy would be sold, for illustrative purposes.

A. For sales purposes?

Q. Yes.

A. No, I can't do that.

Q. You have never done any selling?

A. Personally, some years ago.

Trial Examiner Hier: Mr. Brookfield, you said down to "N". I have it marked "L". Check that again. We might as well get the record straight.

Mr. Brookfield: I have got Commission's Exhibit 6-N as a rider.

Trial Examiner Hier: O. K., if it is marked that way. One thing that interests me, Mr. Matthews, do these agents put these circulars and cards and so on in mailings that go out with their other business? For instance, it's conceivable to me one of your agents, Sparks of Washington, whoever he is, runs a fire insurance agency too. Now, does he customarily or is it company policy or practice to put these solicitations for health and accident policies in premium notices of fire insurance or in the same envelope with solicitations of fire coverage or anything of that sort? What [fol. 74] is the practice?

The Witness: Quite a bit of the material is used along those lines. That's stuffers, as we call it.

Trial Examiner Hier: You have no objection?

The Witness: No.

Trial Examiner Hier: You don't care how he sends it out as long as he gets it out?

The Witness: As long as it's sent out properly.

Q. (By Mr. Brookfield) Mr. Matthews, has the company made any studies of the results of the direct mail advertising used by it and its agents so far as you know?

A. Not exhaustive, no.

Q. Well, to what extent have they?

A. Well, generally we go by the results of, shall I say, production. Without requiring any definite records as to percentage of returns, percentage of sales from returns and so forth.

Q. Well, by production, you mean after certain advertising has been used, you then make it for, say, six months

or something like that? Do you then make a survey generally of the agents to see whether or not it is successful?

A. No, sir.

Q. Do you know whether the agents do that either?

A. Well, by natural assumption, I would say that they wouldn't continue to use anything that they didn't think was to their—productive of some results.

[fol. 75] Q. Well, have the agents continued to order—reorder certain of the literature?

A. Certain agents have reordered certain types of literature, yes.

Q. This literature is not a one shot literature, generally is not a one shot production, especially that which accompanies the application?

A. It shouldn't be for the best results, but most of our agents are not what you call direct mail order agents or they don't participate to any large degree in direct mail.

Trial Examiner Hier: Who puts out this advertising? Does the National Casualty Company do it in its own office or advertising agency or what?

The Witness: Primarily in its own office.

Q. (Br. Mr. Brookfield) Mr. Matthews, before any advertising is distributed to these agents, is it submitted to the insurance commissioner in Michigan?

A. I don't believe it has been.

Q. Referring back to the agencies themselves, are these agencies assigned to geographical areas?

A. When you say assigned, do you mean in just what respect?

Q. Well, I mean, in other words, is the United States divided up into geographical areas?

A. No, sir.

Q. How are these agencies appointed then?

A. Well, say that an agent down in Elyria, Ohio, would like to have an agency and that territory isn't productive at the time he makes application and he meets our require-

[fol. 76] ments, well, he might just operate in Elyria, Ohio, and perhaps a small number of miles adjacent thereto, but there isn't any confining stipulation.

Q. Now, you have used that statement, "meets our requirements" a number of times. What do you mean by that? What requirements do you have for your agents?

A. Well, first of all, we require that they have the highest integrity. They are investigated thoroughly, every agent before he's appointed, he must know how to sell accident and health insurance. He must have a good background. I would say those are mostly the prime factors.

Trial Examiner Hier: What do you mean by a good background? Financial, moral, business or what?

The Witness: Practically everything you have mentioned.

Q. (By Mr. Brookfield) In other words, you don't hire anybody but successful salesmen?

A. That would all depend on what would be considered degree of success. Some people have shown ability to sell, but haven't realized their capabilities as yet.

Q. Do you have any educational requirements of your agents?

A. In what regard, college degrees?

Q. Yes, formal education or otherwise.

A. Well, I would say formal education. In other words, many an agent is successful who hasn't graduated from grammar school, where the college man who has isn't successful.

[fol. 77] Q. You are interested in securing producers, isn't that right?

A. We are interested in securing production, that's our business, interested in securing producers, yes.

Q. To what extent do you regulate these agencies?

A. Well, now, just what do you mean by regulate, Mr. Brookfield?

Q. Well——

A. Remember they are independent contractors.

Q. Well, don't they have a contract which provides for certain Government direction by the company, or are they let run wild?

A. According to their direct contract, there are stipulations in there as to certain things which they cannot do.

Q. What are those particularly?

A. Well, I would like to quote from one of our agency contracts which I don't believe we have available here, but one is they are not to involve the company in the payment of any obligations of any bills and things of that nature without company consent. That they conduct their business

in accordance with company regulations which means the rendering of reports on certain days and certain times. That they are to confine their representations to the printed text of the contract being sold. They are not to engage in dissemination of any particular advertising that might be of a harmful nature without permission of the home office and that gives you a pretty good idea. It also outlines their commission schedule.

Q. Well, can one agent sell in a town where another agent is already franchised?

[fol. 78] A. We don't have any franchises.

Q. You don't have any strict geographical areas?

A. No, sir.

Q. Mr. Matthews, has the company published any sample policies to be distributed by the agents to prospective customers?

A. We have printed many, many thousands of specimen policies.

Q. Minute policies?

A. No, sir, full size.

Q. And are they distributed to your agents?

A. Yes, sir.

Q. Do you know how many thousands? You stated "many, many".

A. No, sir.

Q. Sir?

A. No, sir.

Q. How long have you been publishing these sample policies?

A. Well, I have been with the company eighteen years and they had them when I came.

Q. Samples or specimens of sample policies made up in each as each new policy is developed?

A. Definitely.

Q. And distributed to the agents who are going to sell them?

A. Definitely.

Q. They have a portfolio of policies?

A. And then they order up additional quantities.

Q. Is that a usual and ordinary practice of the agents to order up?

[fol. 79] A. What was that, sir?

Q. Is that a usual and ordinary practice for them to reorder these?

A. Very general practice.

Q. Wherever the agents are located?

A. Because they use quite a few of these specimen policies.

Q. Mr. Matthews, did I ask you who fills in the blanks on the policies when the application has been signed by the prospect?

A. I believe you asked me before whether the policy was typed in the home office and the answers inserted there, is that right? Yo. are referring to the application?

Q. No, I am referring now to the policy itself. You stated before——

A. The policy is typed and issued at the home office unless an agent has a policy issuing privilege.

Q. Are you familiar with the terms of the various policies and premiums schedules or is Mr. Lapham or Mr. Zell or any of those?

A. I am rather familiar with them. Of course, Mr. Lapham of the underwriting department handles the actual checking of the rate and quotations.

Q. Now, referring to Commission's Exhibit 6-A, which is typical of the policies sold by the company, is it not?

A. Well, now, that would depend upon what you meant by typical.

Q. That is a typical accident-health policy, is it not?

A. As to the phraseology and so forth?

Q. Yes.

[fol. 80] A. I would say so.

Q. Now, when——

Mr. Langs: Will you speak up, Mr. Matthews.

The Witness: I am sorry.

Q. (By Mr. Brookfield) When the policy is sold to an applicant, how will those blank spaces be filled in? Do you know that?

A. Well——

Q. As to the amounts, what goes in.

A. You see, Mr. Brookfield, the applications are all taken by agents. There is no direct selling from this material. The application is sent in to the home office and from that

application, if the premium is correctly quoted, which it is, then that information is checked against our records to see it is correct and then inserted in the proper place in the policy. That's done by what is called by policy.

Q. The policy underwriting man does that under your direction?

A. Underwriting department.

Q. When do these policies go into effect? Do they have a specified date after the application is signed and after it's received by the company? Or what would be that?

A. Well, the policy takes effect upon the date of issue at the home office of the policy, if the premium is paid.

Q. Then the policy would take effect when the premium has been paid, the application has been processed and reviewed by the home office and the policy issued by the home office?

A. Yes, sir.

[fol. 81] Q. And then the policy is returned to the agent for distribution to give to the insured?

A. For delivery to the insured.

Q. And it has been in effect and force before it's delivered to the insured?

A. That's right.

Trial Examiner Hier: What's the effective date of the policy isued by the direct issuing agent, the date he issues or the date you validate it?

The Witness: Date he issues it.

Mr. Brookfield: I think that's all for you, Mr. Matthews, thank you, sir.

Trial Examiner Hier: Very well.

Cross-examination.

By Mr. Langs:

Q. I will try and cover a few things here in the next fifteen minutes. Mr. Matthews, you have indicated here in the discussion or in your statements with reference to certain items that have been made up as advertising material and there are many forms and there are many letters and circulars which you have referred to. Why are there many forms and circulars and letters? Why are they not all the same?

A. Well, there are two reasons I can think of at the moment. One is that the material itself is in a state of flux through continued striving for improvement, plus the fact that in the last few years the—from a practical standpoint, the returns from direct mail have fallen off so appreciably [fol. 82] that it's become a very expensive program for an agent to assume.

Q. Are there changes also as to what one agent might want as compared with what some other agent might want in a particular form?

A. Definitely.

Q. And is it a practice of the company where a particular form does not seem to be needed or have any further use that you delete it or mark it obsolete or discontinue it?

A. That is the general practice.

Q. And is that a continuing process which goes on all the time?

A. Yes, sir.

Q. Now, you have indicated here on two or three occasions this afternoon that the selling of the policies of National Casualty Company is not done by direct mail. And I believe you indicated, did you not, that approximately ninety-eight or ninety-nine percent of the policies are handled through agents before they come into the home office?

A. That is correct.

Q. Now, I believe also you have indicated that these applications are—applications for insurance are taken by the agent?

A. They are taken personally by the agent from the customer.

Q. And does it also follow that the agent is the one who is doing the selling in order to obtain the insurance policy or the, what you call, production?

A. Definitely.

Q. Now, the agent, I believe you also mentioned, is re- [fol. 83] sponsible for—whether you mentioned it or Mr. Korn—is responsible for following through on renewals. Is the renewal business an important part of the agent's function, an important part of his continuing compensation?

A. Well, we feel, the agency department, that the renewal portion of the business is just as important as the new business.

Q. Now——

A. As a matter of fact, if an agent isn't interested in building a renewal account, then we are not interested in him.

Q. Now, in order for him to render or develop a so-called continuing renewal business, I assume he would have to render service to his customers, the people he contacts, is that correct?

A. That is right.

Q. And that becomes a personal service between the agent and the insured?

A. Definitely.

Q. Are there occasions where general insurance brokers may have certain special business that they place either with the agents of the company or through the company at its home office? Do you ever have anything like that?

A. All business of what you might call general insurance brokers is placed through the agency of the company.

Q. Are there occasions where brokers do place such types of insurance?

A. That is correct.

Q. And in that instance, why your agent would not have [fol. 84] the contact with the insured but would pick up the information from the broker, is that correct?

A. From the broker.

Q. Well, is it a fair statement then to say that the advertising material which has been spoken of here is not used to sell, as such?

A. The material that——

Mr. Brookfield: Mr. Examiner, I don't think that question is proper. He is cross-examining his own official of the company.

Mr. Langs: I am cross-examining your witness.

Trial Examiner Hier: Well, you asked it on direct. You may answer the question to the best of your ability.

Mr. Langs: Would you repeat the question for the witness.

(The reporter read the question as follows:

"Question: Well, is it a fair statement then to say that the advertising material which has been spoken of here is not used to sell, as such?")

The Witness: That is correct. It is not used to sell, as such.

Trial Examiner Hier: What do you or counsel, either one of you, mean "sell, as such"?

The Witness: Well, may I answer that, counsel?

Mr. Langs: Yes, go right ahead.

The Witness: Well, take the material I was reading off as to quantity. That material is disseminated in such quan- [fol. 85] tities as I mentioned and the agent receives a card or a tearoff slip from the bottom and when he contacts the prospect, the sale is not made from the direct mailing material. It is made from the circular material or application material of the company and its policy.

Trial Examiner Hier: I can't see any other purpose than this material being printed and disseminated, if it isn't to stimulate interest in that policy to sell.

The Witness: The purpose is to stimulate interest for inquiry purposes.

Trial Examiner Hier: Is it accurate then for me to think that it is merely to obtain leads?

The Witness: It is to obtain what you might call contacts so that the agent can govern his time and not, well, I won't use the term "waste", but knock on doors, let's put it that way. He can govern his time periodically.

Trial Examiner Hier: Go ahead.

Q. (By Mr. Langs) Now, you mentioned that—something about the instance that the adverising material is not submitted to the Michigan Insurance Commissioner. It is a fact, isn't it, Mr. Matthews, that the Insurance Department of the State of Michigan makes periodic examinations of all of the activities and the affairs of the National Casualty Company?

A. That is correct, sir.

Q. Now, with reference to the application that Mr. Brookfield has spoken to you about and how it is prepared, what happens to that application or a copy of that application after it comes into the home office? Is it attached to the [fol. 86] policy or just what happens?

A. There is an actual photostatic copy made of the application, which is affixed to the policy.

Q. And is that then returned as a part of the policy to the insured?

A. It is a part of the policy.

Q. And is it attached when it is given back to him by the agent?

A. Yes, sir.

Q. As a matter of fact, the law requires that a copy of the application be attached to the insurance policy, isn't that correct?

A. That is correct.

Q. Now, with reference to these policies which you have indicated are—which are set forth in the exhibits, are used in different states. Some policies are used in one state; some are used in another state; some are used in several states. To the extent that those policies are used in any particular state, isn't it true that those policies are submitted and approved by the Insurance Commissioner of those states before that policy can be or is sold in those states?

Mr. Brookfield: Object to that as going beyond the direce examination testimony.

Mr. Langs: Well, I don't think so. He's gone into that situation.

Trial Examiner Hier: Well, you brought out these specimen policies had been disseminated over the United States. I never did see the materiality of that, but I assume it's there. You must have some purpose in it. I don't see the [fol. 87] materiality. He's not charging here anything deceptive about your policies as such. What he's charging here is the discrepancy between advertisement of the policy and I don't see the materiality of any of this. But since your questions went in, this one will go in. You may answer.

The Witness: All policies are submitted to the respective insurance departments of the states before they are sold in any state.

Q. (By Mr. Langs) Not only are they submitted, but they are approved before you sell them?

A. Approved or marked for filing by the insurance commissioner.

Q. Now, in connection with the material which you submitted on Exhibit 61-A, B, C and D, you have, Mr. Matthews, a list of items that you had indicated had been printed and distributed during certain dates. Now, do you

have those? I guess I have got the material here that you were working with.

Now, referring to item which is 2186, you commented that that had been distributed to January 19, 1955, and why did you use a date of January 19, 1955?

A. It was obsoleted as of that date. Not reprinted.

Q. And that refers to this form 2186?

A. That's right.

Q. Now, I refer you to the form 2125A and ask you whether or not you gave a date of October 8, 1954, as the final date?

A. Obsoleted as of that date.

Q. That's the reason why you used that final date?

A. That's right.

[fol. 88] Q. So that after that date, the form was no longer printed for dissemination?

A. That is correct.

Q. You also on form number 2191, you gave a date of November 29, 1954. And again why did you use that date?

A. The material was obsoleted as of that date.

Q. On form number LPM G you gave the date of November 8, 1954, and why did you use that as the final date?

A. The material was obsoleted as of that date.

Trial Examiner Hier: Mr. Matthews, when you say the material was obsoleted, in the home office, am I to understand that the agents, once that occurs, are forbidden to disseminate any more of it?

The Witness: The supply in the home office was entirely depleted and was not reprinted.

Trial Examiner Hier: There still might be some more disseminated?

The Witness: If an agent had some in his possession, he might.

Q. (By Mr. Langs) On form LPM D you give the date of March 4, 1955, and again why was that date used?

A. The material was obsoleted on that date.

Q. And on form LPM H, you give the date of March 11, 1955, and why did you use that date in your discussion?

A. Because the subpoena denoted a date of March 11, 1953, to March 11, 1955, but that has now been discontinued also.

[fol. 89] Q. That form has been discontinued?

A. Obsoleted.

Q. As to form number 2196, you again use the date of March 11, 1955, and why did you use that date as the final date?

A. That is the same as applicable as to LPM/H.

Q. And has that one been discontinued?

A. Definitely.

Q. As to form number 2221, you use a final date of January 31, 1955, and why did you use that date?

A. The material was obsoleted on that date also.

Q. And as to form HV, you used a last date of June 1, 1953. Why did you use that date?

A. Because the material was obsoleted and not reprinted.

Q. And on Form JTK, you used the final date of October 19, 1953, and why did you use that date?

A. That material was obsoleted as of that date.

Q. On form number MB #1, you used a date of March 11, 1955, and why did you use that as the final date on that one?

A. That is the date, the last date of the period called for by the Federal Trade Commission in its subpoena and that piece of material is currently being reviewed for reprinting.

Q. That has not been discontinued as of the present time?

A. No, sir.

Q. On form number MB #2, you have used a date of June 16, 1954, as the final date and why did you use that date?

[fol. 90] A. The material was obsoleted as of that date for improvement or change.

Q. And on form number MB #3, you used the final date of November 24, 1954, and why did you use that date?

A. That was the obsoleted date, November 24, 1954.

Q. And on MB #4, you used a date of March 11, 1955, and why did you use that as your final date?

A. That was the final date requested by the Federal Trade Commission.

Q. All right. Now, certain additional material beginning with Exhibit Number 69, I believe I am correct on that, am I right on that?

Trial Examiner Hier: 62, Mr. Langs.

Mr. Brookfield: 62.

Q. (By Mr. Langs) On Exhibit Number 62, you gave a final date of March 24, 1954. Why did you use that as the final date?

A. Could I see the exhibit.

Trial Examiner Hier: That's the green and white one.

The Witness: This is obsoleted as of March 24, 1954.

Q. (By Mr. Langs) All right. Now, the same thing on Exhibit Number 63, you used the date of March 11, 1955.

A. Sixty-three, well that was the last period date called for in the subpoena of the Federal Trade Commission. To the best of my knowledge, this is now obsolete. There were only 275 printed.

Q. All right. I refer you to Number 64, Exhibit 64, which has a final date of March 1, 1954, and ask you why you used that date.

[fol. 91] A. This was a letter printed simply for one agency and obsoleted as of March 1, 1954.

Q. I refer you to Exhibit Number 65 and you used the date of January 30, 1955. Why did you use that date?

A. This was obsoleted as of March 30, 1955.

Q. January 30?

A. January 30 from December 23. That was only used for a period of a little over a month.

Q. All right. I refer you to Exhibit 66 wherein you have used the date of March 11, 1955, and why did you use that date?

A. Well, March 11, 1955, was the last date required by the Federal Trade Commission as to the submission of material used during that period, from March 11, '53, to March 11, '55.

Q. Has that form been discontinued?

A. Not yet, sir.

Q. I refer you to Exhibit 67 and call your attention to the fact you used the date of November 24, 1954, and why did you use that particular date?

A. This one was obsoleted on November 24, 1954, and not reprinted.

Q. I shall refer you to Exhibit Number 68 wherein you have used the date of January 31, 1955, and why did you use that date?

A. This form was also obsoleted as of that date, January 31, 1955, and not reprinted.

Q. I refer you to Exhibit Number 69 wherein you have [fol. 92] used the date of March 11, 1955, and ask you why you used that date?

A. This was the final date of the period required by the Federal Trade Commission.

Q. And has that form been discontinued?

A. This form is still in use.

Q. I refer you to Exhibit Number 70 wherein you have used the date of January 31, 1955, and ask you why you used that date?

A. That was the last date required for the period required by the F. T. C. for its advertising material. This newspaper mat here is January 31.

Q. Why was January 31, 1955, used as the final date for dissemination?

A. Because this advertisement was discontinued as of this date. Incidentally, only used twice.

Q. Mr. Matthews, you indicated that you had been with the National Casualty Company about eighteen years.

A. That is correct, sir.

Q. How long have you been the director of agencies?

A. Approximately three years.

Q. What was your work before that time?

A. In the agency department of the company as assistant agency supervisor.

Q. How long had you had that function?

A. Some fifteen years.

Q. During the period of eighteen years you have either [fol. 93] been the assistant of that department or the director of that department?

A. That is correct.

Q. And you also indicated that part of your program was to supervise the agencies?

A. I——

Q. That is, try and get out production and also to take care of any of their needs or wants and any problems that might arise between the company and the agency, is that what you did?

A. That is correct, sir.

Q. Can you describe the, in any fuller detail than that, as to just what you might have done?

A. Well, of course, quite a bit of the work is routine inasmuch as various agencies have certain problems. They come to us for advice and counsel. They solicit ways and means of perhaps improving, increasing their volume, which we endeavor to generally give to them voluntarily; in our field work, we contact them personally and endeavor to stimulate them, discuss their problems with them and discuss ways and means of improving their caliber of business, you might say, or anything at all that they might bring up on the subject of their relationship with the company.

Q. In the event that some insured had a complaint or any problem which you felt was making him unhappy as to his relationships with the company or a particular agent, would that come into your department?

A. It would, sir.

Q. And what would you do with such a problem?

[fol. 94] A. Well, of course, any complaints that are made to an agent we hear about and very quickly.

Q. Yes.

A. And we endeavor at all times to as promptly as possible ascertain the true facts of the complaint and resolve it equitably to all parties concerned.

Q. Now, during this period of time when you have been the head of this department, have you ever received any complaints or claims from an insured that they had bought a policy upon the piece of advertised literature which they claim deceived them?

A. No, sir, I have not.

Mr. Brookfield: I object.

Trial Examiner Hier: Overruled.

Q. (By Mr. Langs) And during the time you were the assistant director of this department, I will ask you the same question. Did you ever receive any——

A. No, sir, I have not.

Mr. Langs: I believe that's all that I have.

Redirect examination.

By Mr. Brookfield:

Q. Mr. Matthews, I believe in answer to a question asked by Mr. Langs, you stated that the advertising material is not used to sell insurance, is that what you meant?

A. Are you speaking of the advertising material in its entirety or the direct mail material which is disseminated?

[fol. 95] Q. Well, the material which we have in the record here.

A. Some of it is in the form of circular applications which might be used in a presentation.

Q. And what is the purpose of the others then?

A. The others is simply to stimulate interest in the insurance and perhaps to, or rather to engender inquiries.

Q. In other words, it's for the purpose of having people contact your agency, is it not?

A. Generally speaking as regards the direct mail and direct cards.

Q. So in turn the agents can sell them insurance.

A. Personally.

Q. I believe in another question, I believe Mr. Langs asked you, did the Michigan Insurance Commissioner make periodic examinations of your company.

A. That is correct, sir.

Q. And you stated that it does. Well, at the time of this examination, does the insurance commissioner examine all the advertising matter which has been used?

A. Everything in the company's files are open for his inspection.

Q. Well, does he?

Trial Examiner Hier: That isn't the answer to the question though. It may be open for his inspection. Did he go through them?

The Witness: That is a question which I would not be [fol. 96] able to answer exactly because I am in and out of town quite frequently and during the course of some of these examinations, I might not have been present.

Q. (By Mr. Brookfield) Well, is it not a fact that this examination is specialized, you might say, on the financial

and policy issuing ends of the business, rather than the advertising?

A. I believe a great deal of it pertains to accounting end of it.

Q. Do you have correspondence in your files indicating approval of the advertising by the Michigan Commissioner?

A. No, sir.

Trial Examiner Hier: How does he work? Does he affirmatively approve advertising in this state or does he just disapprove of that which he doesn't like or what happens? Do you send the stuff up to his office before you issue it?

The Witness: No, sir.

Trial Examiner Hier: Well, I assume then if there is negative disapproval, unless you hear something from him, why you go ahead and use it.

The Witness: I would say that is about right.

Q. (By Mr. Brookfield) Mr. Matthews, when was the last examination of your company made?

A. I believe we are being examined right now.

Q. When was the previous one before then?

A. I believe four years ago. That's my recollection.

Q. Your advertising, of course, has changed more often [fol. 97] than once every four years.

A. Yes, sir.

Mr. Brookfield: Mr. Examiner, there are several questions of identification that I don't think were made clear, identification of some of this advertising that I don't think are clear in the record and while Mr. Matthews is on the stand, I would like to have those cleared up if there is no objection on the part of Mr. Langs.

Trial Examiner Hier: Go ahead.

Q. (By Mr. Brookfield) Mr. Matthews, referring to Commission's Exhibit Number 62, is that covered in the list which you gave me, rather, the list as Commission's Exhibit 61?

A. That's covered on the list for material utilized January 1, '54, and 31, '54.

Q. Do you know under what?

A. That's under DP—I believe that's a handout.

Q. Show me on Commission's Exhibit 61-D so I can mark it.

A. 1-19-54; discontinued 3-24-54. Used only in Ohio.

Q. That's Form DP #1?

A. That's right.

Q. Now, Commission's Exhibit 6-D, what form is 6-D as listed on Commission's Exhibit 61?

A. Income Security 8010. The 8010 is the policy form. It's the income security rather.

Q. And 6-E?

A. That's the HV letter.

[fol. 98] Mr. King: HV?

The Witness: HV.

Mr. King: Thank you.

Q. (By Mr. Brookfield) Now, 11-F, Mr. Matthews?

A. CDC.

Q. That's CDC on Exhibit 61?

A. 61-A.

Q. Now with reference to Commission's Exhibit 15-I, how is that designated on Commission's Exhibit 61?

A. That's 61-A?

Q. 61-A, yes, A, B, C, different page for each one.

A. Now, that is designated on 61-C as newspaper mat, hospital plan.

Q. Mr. Matthews, with reference to Commission's Exhibit 18-G, which is your form letter, LPM/D, do you know where that letter was distributed?

The Witness: Form LPM/D during the period 3-11-53 to 12-31-53, total of 3,700 pieces disseminated into Florida, Illinois, Kentucky, Michigan, North Carolina, Ohio, Pennsylvania, Wisconsin; from January 1, 1954, to March 4, '55, 29,000 into the states of Alabama, Indiana, Iowa, Kentucky, Massachusetts, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Tennessee.

Q. (By Mr. Brookfield) Thank you. With reference to Commission's Exhibit 18-D that is a duplicate of the one you just identified, is it not?—a duplicate of 6-E? Just give us the number on that.

[fol. 99] A. This is the HV.

Q. HV letter.

A. That is correct.

Q. Same one we just had?

A. That's a circular.

Q. That was printed for the people in Connecticut?

A. Disseminated only in Connecticut.

Trial Examiner Hier: While we are on that point, Mr. Matthews, when you send these bulk mailings down to your agents, some of them are rather substantial, I believe you send them down by express, I assume, or am I warranted in assuming that the agents in distributing that material, whether by mail or throwaways or handouts or what have you, they cover quite a wide area. On the other hand, they cover quite a very narrow area.

The Witness: That is correct.

Trial Examiner Hier: Am I warranted in assuming that some of that material does cross state lines or not?

The Witness: No, sir, it would not.

Trial Examiner Hier: Well, I had in mind areas like for instance, Philadelphia and Camden, New Jersey, is right across the river. Cincinnati has Covington and Newport across the river. Kansas City, Missouri, and Kansas City, Kansas, and so on. Can you state positively either one way or the other that it does not?

The Witness: Yes, sir, I can because no agent disseminates material into any state in which he is not properly [fol. 100] licensed by that state.

Trial Examiner Hier: Well, now, tell me something about the insurance business. The St. Louis agent, nothing to prevent him being licensed to do business in East Saint Louis, Illinois.

The Witness: He could secure a nonresident license for the State of Illinois, but all policies would have to be countersigned by a resident of Illinois.

Trial Examiner Hier: Same way with Cincinnati and Covington; Philadelphia and Camden and so on?

The Witness: Exactly.

Trial Examiner Hier: Your office really doesn't know the order of circulation?

The Witness: Not exactly, sir, other than it does not go into any state where the agent is not licensed.

Trial Examiner Hier: Any more questions?

Mr. Langs: I have a couple.

Trial Examiner Hier: All right.

Mr. Brookfield: Just one more, sir.

Q. (By Mr. Brookfield) Mr. Matthews, does the home office receive requests from agencies to make up new advertising material or to supplement the advertising material which has been sent to those agencies?

A. On occasion we receive such requests.

Q. And does the home office then make up such advertising?

A. Not necessarily so. We receive quite a number of such requests. We couldn't afford to do so.

[fol. 101] Q. Well, suppose that you had a request from several agencies, suggesting that new advertising material be prepared to further the sale of some particular policy. You have had that, haven't you?

A. Yes, and we would request their specific ideas.

Q. Beg pardon?

A. We would request their specific idéas.

Q. Then would you prepare such advertising?

A. Not necessarily unless we deemed it justified.

Q. Have you in the past prepared such advertising in accordance with such requests?

A. I would say we possibly have.

Mr. Brookfield: I think that's all, Mr. Hier.

Recross-examination.

By Mr. Langs:

Q. Now, these questions about the insurance commissioner, which the Examiner was asking you about, Mr. Matthews, have you ever received any complaints from the insurance commissioner of the State of Michigan that someone had complained to the insurance commissioner who, in turn, had passed it on to you, that they had been deceived by any of this material which had been introduced here?

A. No, sir, we have not.

Q. Have you ever received any such complaints from any insurance commissioner of any state?

A. No, sir, we have not.

Q. Now, one other item and possibly I didn't catch this clearly, but I want to be sure that—I didn't check back the

[fol. 102] record, but at one point in the discussion or the questions and answers yesterday, Mr. Brookfield had asked you certain information or certain questions about advertising and how it was prepared and whether it was approved by the company before it was disseminated and whether or not the agent could go ahead and make up advertising on his own and disseminate it without submitting it to the company and you used the word in there of harmful and that the agent could not use any harmful material. Then you went on without any particular break at that point and indicated no harmful advertising without company approval. Now, of course, I thought I detected a little smile on Mr. Hier's face at the time and I wanted to be sure and correct that, if I heard correctly.

A. Obviously we wouldn't approve any material that was harmful.

Q. Nor do you permit your agents to ever use any such material to the best of your ability?

A. No, sir, we do not.

Q. I just wanted to clear up that one point.

Mr. Langs: That's all I have.

Trial Examiner Hier: Anything more?

Mr. Brookfield: Just one question. By that you mean Mr. Matthews, that the agents before they use any material are supposed to submit it to you?

The Witness: That is right.

Trial Examiner Hier: All right, Mr. Matthews, thank you.

[fol. 103] STATEMENTS OF COUNSEL

Mr. Langs: I would like the record to show that pursuant to the request of Mr. Brookfield, we are furnishing to him an annual statement which is printed for filing with the several state commissioners which was filed with the State of Michigan and others as indicated for the year 1953 and the year 1954 and also a statement of the dissemination of circular LPM/F as it was issued during the year '53, March 11, 1953, to December 31, 1953, and January 1, 1954 to October 8, 1954, when the form was discontinued and marked obsolete.

Mr. Brookfield: Mr. Examiner, I ask that the 1953 Annual Statement of the National Casualty Company be received in evidence as Commission's Exhibit Number——

Trial Examiner: 75.

Mr. Brookfield: And the 1954 Annual Statement of the National Casualty Company be received as Commission's Exhibit 76.

(The documents referred to were marked Commission's Exhibits 75 and 76 for identification.)

Trial Examiner Hier: Do you have any objection, Mr. Langs, except the continuing objection?

Mr. Langs: Not at all.

Trial Examiner Hier: That objection is overruled and the documents are received.

(The documents referred to, heretofore marked for identification Commission's Exhibit 75 and 76, were received in evidence.)

Mr. Brookfield: And the dissemination data just referred [fol. 104] to by Mr. Langs as referring to the Form LPM/F be received in evidence as Commission's Exhibit Number 77.

Trial Examiner Hier: All right. LPM/F—what's the date on it?

Mr. Brookfield: That's the form referred to in the Commission's Exhibit 61.

Trial Examiner Hier: All right.

Mr. Brookfield: And it shows the dates of dissemination and the figures.

Trial Examiner Hier: Same situation, Mr. Langs?

Mr. Langs: Yes.

Trial Examiner Hier: All right, same ruling. Commission's Exhibit 77 is marked and received in evidence.

(The paper referred to was marked Commission's Exhibit 77 for identification and received in evidence.)

Mr. Brookfield: Mr. Examiner, that concludes the taking of testimony at this hearing in Michigan, in Detroit, and I request, as I have done off the record, that the Commission's case be adjourned to a mutually agreeable period of —just a moment.

At this time I would like the Examiner to take judicial notice of the insurance statutes of the various states and I will have Mr. King read the various citations.

Trial Examiner Hier: Court citations?

Mr. Brookfield: Yes.

Trial Examiner Hier: I am sure that counsel and every-[fol. 105] body knows what they are. You just dictate them to the reporter.

(Whereupon, the following was copied into the record by the reporter:)

States with Unfair Trade Practices—Model Bill

1. Arizona—Insurance Code, Chapter 64, Art. 21, Sec. 1 to 21.
2. Arkansas—Arkansas Statutes 1947, Title 66, Sec. 1701-1713.
3. Colorado—Chapter 72, Art. 15, Secs. 1 through 13, Colorado Revised Statutes.
4. Florida—Florida Statutes Annotated, Vol. 18, Sec. 643.01 to .13.
5. Georgia—Code of Georgia Annotated, Book 17, Title 56, Secs. 401(a) to 413(a).
6. Hawaii—Chapter 161(c), Section 8553.01 to 8553.14, Session Laws of Hawaii, 1951.
7. Iowa—H.B. 332 enacted April 15, 1955.
8. Indiana—Burns Indiana State, Title 39, Sec. 39-5301-53018.
9. Kentucky—Article 28, Sec. 304.924 to 304.945 Rev. Stat.
10. Louisiana—Title 22, Sec. 1211-1217 as amended.
11. Maine—Chapter 56, Sec. 130-133.
12. Maryland—Article 48A, Sec. 258-272.
13. Massachusetts—Chapter 176D, Sec. 1 (1947), page 33.
14. Michigan—Chapter 547, Sec. A. 1.
15. Minnesota—Chapter 72, Sec. 72.21-72.23.
16. Nebraska—Chapter 44, Sec. 44:1501-1504. See also [fol. 106] Chapter 44, Sec. 750-752.
17. Nevada—Chapter 189, Sec. 49-491 (see also Chapter 189, Sec. 45).
18. New Hampshire—Chapter 333-A, Sec. 1-4.
19. New Jersey—Sections 17:29B-1 to 17:29B-14.
20. New York—Chapter 501, Article IX-D, Sec. 270-282 (1948).

21. New Mexico—Section 60-712 to 60-722.
22. North Carolina—Section 58-54.1 to 58-54.13.
23. Pennsylvania—Title 40, Sec. 1151 to 1162.
24. South Carolina—Article 12; Section 8110 to 8110-14.
25. South Dakota—Chapter 144 (H.B. 118) (1947 Session), p. 38.
26. Tennessee—Article XIX, Sections 6459.56 to 6459.64.
27. Virginia—Title 38, Section 38.1-49 to 38.1-57 (1947).
28. West Virginia—H.B. 67 enacted March 14, 1955.
29. Wisconsin—Chapter 207, Sections 207.01 to 207.14.
30. Wyoming—Reg. Sess. 1955, H.B. 170, Secs. 1-13.

States with Limited False Advertising Statutes

1. Alabama—Title 28, Sec. 26 (4601), 1941-pg. 39. Title 28, Sec. 28 (4603), 1941.
2. California—Chapter 1, Art. 6, 780, 781, 782, 783, 783.5 and 784. Chapter 5, Art. 3, Sec. 1731.
3. Delaware—Chapter 486, Sec. 25 (1949), Chapter 488, Sec. 27.
4. Idaho—Chapter 12, Sec. 41-1204, 41-1206.
5. Illinois—Article IX, Sec. 149 (1939), Art. XXIV, Sec. 401.

[fol. 107] 6. Kansas—Chap. 40, Sections 40-235 and 40-242 and Section 40-222.

7. North Dakota—Chapter 26-10, Sections 26-1011, 26-1013, 26-1015, 26-1012, also 26-09A01 to 26-09A07.
8. Ohio—Section 13171 to 13173; also 3905.43; 3923.16 and 3999.08.
9. Oklahoma—Title 36, Sections 821, 822 and 823. Title 36, Sec. 144.
10. Texas—Article 580b (1951) Art. 21.20 also Art. 1554.
11. Utah—Chapter 63, title 27, Sec. 43-27-1 to 43-27-22.
12. Vermont—Chapter 390, Sections 9222, 9223, 9185.
13. Washington—Article 30, Sec. .30.01 to .30.09.

States Without Any False Advertising Statutes

1. Connecticut—6031.
2. Mississippi—Section 5683 (1943), page 79 (pertains to applications for insurance).
3. Rhode Island—(P.L. 1948), Chap. 2134.

States With Statutes Regulating Advertising that Pertains to Life Insurance Companies Only.

1. District of Columbia—Title 35, Sec. 35-714, Title 35, Sec. 35-1340.
2. Missouri—Chapter 376, Sec. 376.590 and 376.600.
3. Montana—Section 40-1939 (1951), page 97, Section 40-1942, 40-1425.
4. Oregon—Section 101-513 (1951), page 68. Section 101-128 (1951) or Section 736.455 (1954).

[fol. 108] Mr. Langs: I would like to interpose my objection on jurisdiction which I think goes to the point which I mentioned yesterday and again this morning. It is not a question of what the other states may have. Our position is that we are covered by the Michigan Law and that the Michigan law provides the minimum standards that we can use in any state and that the only problem involved would be one where a state would require a standard higher. Michigan has one of the best insurance codes in the country and what another state might have would not be material in this case, because the Michigan law does provide for full and complete coverage of all activities of the insurance code with a very aggressive insurance department and these other states, as such, could only add more to it, but not less.

Trial Examiner Hier: Your position is that the only inquiry I may make to determine jurisdiction, has Michigan occupied the field?

Mr. Langs: That is correct.

Trial Examiner Hier: Their position is that I have got to look at all forty-eight states. I am going on the other theory until we get along here further and I can look up some law of my own.

Now, these states that Mr. King has dictated into the record fall into various groups. There are twenty-seven states, as I recall it, that have this so-called model code, which are, in substance, the same as the Michigan Code,

although probably less detailed and somewhat less specificity.

Are Government counsel seriously contending that juris-[fol. 109] diction exists in those twenty-seven states?

Mr. Brookfield: Mr. Examiner, Government counsel contends, sir, and until it's been overruled that we have jurisdiction over the activities of any company which—in all of the states in which it operates, all of the states in which it has license or all of the states in which it mails literature to the state.

Trial Examiner Hier: Well, I can't agree with you. This is not a case such as usually arises under the Federal Trade Commission Act where a company is engaged in interstate commerce, and does a nation-wide business, and you need not show any particular unfair, deceptive act in each state; you need only show two or three to show a pattern. This is the reverse of that. Here, it seems to me, you have to establish jurisdiction in every state because Congress itself has compartmentalized this picture. I am aware of all these cases that you fellows always throw at me, that you have to judge interstate commerce by the whole picture. You can't pick it apart because you won't be able to pick it apart. That's true, that's the law. Congress itself has split this thing up in forty-eight compartments. It seems to me you have got to show not only deceptive acts and practices in each of the forty-eight states, but certainly establish that that state has not preempted the regulatory field with regard to that subject matter and, for the life of me, I don't see how in the world you can do it with these twenty-even states, because the provisions there, while not quite specific as the Michigan Code, are certainly very specific.

There is no "to the extent" used in Public Law 15. It is [fol. 110] fully regulated, in my opinion. So far as I am concerned, twenty-seven states are out of this case unless you come up with something that I can't possibly anticipate at this point.

Now, at the other end of the picture, if I recall correctly, there are three states that have no regulation.

Mr. Brookfield: That's right.

Trial Examiner Hier: No state law at all. All right.

Mr. Brookfield: Then there are six states approximately that do not regulate anything except——

Trial Examiner Hier: Life.

Mr. Brookfield: Life insurance.

Trial Examiner Hier: I think that's fairly inferable from the face of the statutes themselves. Now, let me see, that leaves thirteen states which are more or less the real battleground here and on that respect, I want to ask you at this time quoting, for instance, from the California Code, and I find this language in other codes: "No insurance company doing business in this state, no officer," and so forth, "no agents, no broker shall make, issue, circulate or cause to be issued or circulated, any estimate, illustration, circular or statement of any sort, misrepresenting the terms of any policy issued by it with benefits or advantages promised thereby or the dividend and share of surplus to be received thereon."

Do you construe the word "terms" and the word "benefits" in a financial sense only because of the third clause or do you construe it to indicate the subject matter that's [fol. 111] involved in this proceeding? You see that third clause says, or the dividend or share of the surplus to be received thereon. There seems to be quite a division of opinion on that point.

Mr. Brookfield: My contention is that on that point that this was intended to cover the financial. In other words, direct financial.

Trial Examiner Hier: You mean misrepresent its financial condition, ability to pay claims. You claim it's limited to that?

Mr. Brookfield: To the greater extent, yes, sir.

Trial Examiner Hier: It seems to me "terms", "benefits", certainly are wider than any profit-sharing mentioned.

Mr. Brookfield: Well, I might say, sir——

Trial Examiner Hier: You dig me up some law on that point, if you can find any, because I am inclined to think this doesn't.

Mr. Brookfield: What I was getting ready to say, I wasn't prepared to argue that point here this morning. You took me unawares.

Trial Examiner Hier: I am bringing up these points now so you won't be caught unawares next time. I would like to have some law on that, if you can find it, because there are a good many statutes in that shape. Well, you are not sure that you are through?

Mr. Brookfield: To be frank, that is the exact story.

Trial Examiner Hier: Well, I told you before that I won't go into this question of enforcement. If there is a statute, I will take the statute and make up my mind as to [fol. 112] whether it preempts the field. If it does, jurisdiction is out as far as I am concerned. It is certainly out in twenty-seven states that have this model code.

(Whereupon, at 10:45 a.m., May 11, 1955, the hearing in the above-entitled matter was adjourned.)

[fol. 113] Wednesday, October 12, 1955.

Met, pursuant to adjournment, at 10:00 a.m.

PETER G. KORN, was thereupon called as a witness for the Respondent, and, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Langs:

Q. . . . Will you indicate—first of all, how many years have you been in the insurance business?

A. Thirty-one years.

Q. How many years of that period have you spent in accident and health and hospitalization insurance?

A. All of the time.

Q. What jobs or type of work have you performed during the course of those years?

A. Underwriting, claims, agency, agency involving sales, promotion, administrative.

Q. So that during the course of the thirty-one years that you have been in this business you have participated in the functions of all of the principal departments of an insurance company that handles A and H and Hospital insurance, is that correct?

A. That is correct.

[fol. 114] Q. Now, isn't it true also that during that period of time that there have been certain changes which have taken place in the handling of A and H and Hospital insurance?

A. That is correct.

Q. Particularly many years ago hospitalization insurance was almost an unknown thing?

A. Correct.

Q. And today hospitalization insurance is quite a well-known thing, is that correct?

A. Correct.

Q. Your span of service in the insurance business has taken you through some of these changes which have occurred in this type of business?

A. That is correct.

Q. In other words, you were in it before the hospitalization insurance became a factor, a principal factor, and you are in it today where hospitalization insurance has become a very important factor?

A. Right.

Q. Now Mr. Korn, I want to take certain specific allegations which the Federal Trade Commission has set forth in its complaint which they have picked up out of the context and made certain inferences and innuendoes about for the purpose of clarifying the records so far as the respondent's position is concerned, and in the complaint I think the first item that they set forth is the statement, "No increase in premium because of age—No decrease in benefits because of age."

Now, number one, are there any policies which are issued [fol. 115] by A and H companies, companies handling the type of insurance which this company handles, that provides for increasing the premiums each year or decreasing the benefits each year?

A. There are policies that provide for increase in premiums. Possibly not each year, but at a given age; and some that reduce the benefits on a given age.

Q. Now, from an historical point, Mr. Korn, covering your experience in this type of business, what years ago was the type of policy, the principal type of policy, that was written in the A and H business? Did it provide for an increase in premiums at a given age? A decrease in benefits at a given age? As disfinguished from a permanent premium basis? Was there a difference between those two types of policies several years ago?

Mr. Brookfield: Mr. Examiner, I think this is getting away beyond the complaint.

Trial Examiner Hier: I don't know whether it is or not. Go ahead and find out. We can't tell at this stage.

Q. (By Mr. Langs) Go ahead.

A. Accident and Health insurance is primarily considered as accidental death and disability insurance, loss of time insurance. Years ago the companies used to write policies. It was quite prevalent that at a given age the premium would increase, say, at age fifty or fi-ty-five, or some companies had a provision that at that given age the benefits would be reduced a certain percentage.

As the industry progressed, the demand greater, com- [fol. 116] panies developed what might be termed a level premium, the premium at the time of the acceptance of the risk would be continued as long as the risk was insured with the company.

Then there was a development of hospitalization insurance, which came in later, and in the hospitalization field the same increase in rates or decrease in benefits prevailed.

So, to meet the demand of the public, provide for broad coverage, to be able to give the risk a premium that would be level throughout the existence of his policy, the company followed that practice. I would term it a liberalization policy or practice.

Q. Now, when or as this evolution took place which you have described, this statement which has appeared in certain advertising and which specifically and apparently was picked up verbatim out of exhibit Commission's 6(j)—I show you Exhibit Commission's 6(j)—as this evolution took place was this statement used for the purpose of distinguishing between the two types of insurance?

A. Yes, sir.

Q. Had it been used for a period of how many years, would you say?

A. I would say that this statement might have been used for the past fifteen years or more.

Q. And tell the Examiner, as an expert—one who has been involved in this type of business all of your life—why this statement was used.

A. As I previously related, accident and health insurance possibly followed the trend of life insurance historically

[fol. 117] where, in many of the life associations, benevolent associations, there was an increased premium as the man became an additional year of age, and accident and health followed the same practice, except they would have the attained age at fifty, fifty-five or sixty, where the rate would go up.

To differentiate, to distinguish between that type of policy and one that might be termed a level-premium policy, the companies used the phraseology, "No increase in premium because of age", or the reverse if there were evidences of some policies of other companies that the benefits would be reduced they would say the statement, "No benefits reduced because of age or decreased because of age."

It was the distinguishing factor between other policies.

Q. In other words, this was simply a means of indicating to the public that this policy or the policy issued by this company was different from that of other companies which provided for increase in premium or decrease in benefits?

A. Correct.

Q. And that is all that it was intended to convey, is that right?

Trial Examiner Hier: Or stated otherwise, it was designed to overcome what you felt might be a pre-existing impression resulting from advertising in the past on a certain type of policy?

The Witness: Yes, if such was stated in literature.

Trial Examiner Hier: When you speak of companies you include your own?

The Witness: Yes, we have it in our advertising.

[fol. 118] Q. (By Mr. Langs) Now, in your experience, Mr. Korn, have you had knowledge of any insured coming into the company or to you as an officer of the company, the respondent in this case, during the course of these many years, several years, and holding up to you an exhibit similar to Exhibit 6(j), Commission's Exhibit 6(j), or any other bit of literature that may have made that same statement, and said, "Mr. Korn, you advertise here that this policy provided for no increase in premiums or no decrease in benefits because of age, and I was misled"? Did any insured or anyone ever come to you and tell you they had been misled by that advertisement?

A. No, sir.

Q. Now, another item which the—the Commission has indicated that this statement has caused some improper inference, "For employed men and women ages sixteen to sixty-nine years inclusive". Now, Mr. Korn, going back into the historical evolution of A and H policies, Accident and Health policies, will you indicate for the examiner and this record what changes have taken place with reference to the age limits of people who would be eligible to participate in this type of insurance.

A. Going back prior to the era of hospitalization insurance, the company sold accident and health insurance, disability insurance, loss of income insurance. The purpose of such insurance was to provide the protection for an insurable income. It was presumed that children, minors sixteen years of age or under, did not have an insurable income, and therefore would not qualify for a disability policy. The age limit of fifty, fifty-five or sixty was also assumed as the top income earning age level possibly also [fol. 119] as to a physical risk hazard beyond that age, so the companies wrote business from ages sixteen to fifty-five, fifty-nine, sixty. It was purely in the area within what age brackets were people eligible for such insurance. That was the intention.

As the industry progressed and liberalized, that age bracket of acceptable risks was broadened, and now they go up to sixty-nine, seventy, eighty—particularly with respect to hospitalization insurance—and they also go down too, to as low as date of birth, in some instances fourteen days or a month, whichever may be chosen by the company as the acceptance age bracket.

Q. So that during the evolution of this type of insurance there apparently have been—there have been ideas as to—there have been different ideas as to when or what type or age bracket insurance companies would consider the risk eligible. That has changed or varied over the many years that you have been in this business?

A. Correct.

Q. And is it true that there are companies today that have different age brackets that establish the eligibility of insureds for that particular type of insurance?

A. Yes, sir.

Mr. Brookfield: Mr. Examiner, I don't see what other companies do has anything to do with this case.

Trial Examiner Hier: Nothing, except the background, is all.

Mr. Brookfield: I have purposely——

[fol. 120] Trial Examiner Hier: He is defending partially on evolution. If I get the picture correctly, some of these statements have been made to overcome any public idea the public may have retained advertising back years ago when life expectancy wasn't quite as long, when there was no level premiums, constant premiums, and so on. That's the only purpose he is bringing in other companies for. He is talking about the industry as a whole. Let's go off the record a moment, Mr. McGuire.

(Discussion off the record.)

Trial Examiner Hier: All right, let's go on, Mr. McGuire; the objection is overruled.

Mr. Korn, have you issued policies to people sixty-nine years of age?

The Witness: Yes.

Trial Examiner Hier: And you have issued them at sixteen?

The Witness: Yes.

Trial Examiner Hier: Let's take the next one. Have you issued A and H policies to anyone one day old?

The Witness: That I cannot say specifically.

Trial Examiner Hier: Then I will ask you the question, will you do it?

The Witness: Yes.

Trial Examiner Hier: All right, go ahead.

Q. (By Mr. Langs) Now, following through, Mr. Korn, you have indicated an evolution here of policies having a different age limitation as to eligibility over the course of [fol. 121] years. Now, am I to assume correctly that this statement which has been challenged by the Federal Trade Commission was for the purpose, so far as this Respondent is concerned, of indicating what this respondent will do with reference to eligibility of age limitations? In other words, this is a description of this respondent's eligibility limitations on this particular policy?

A. Correct, sir, on any particular policy for which that statement applies.

Q. Now, although there may be other companies that have age limits, so far as this particular statement is concerned that have a lesser number of years or a greater number of years, nevertheless this is the statement that applies to this respondnt and its policy?

A. Correct.

Q. And it is the advertising which I will show you, Commission's Exhibit 13(b) from which—in part—that statement was lifted by the Federal Trade Commission verbatim, and that is to indicate the coverage that you will extend to age limitations on insureds for the type of policy which is advertised in that literature, is that correct?

A. I would say that it is the acceptance age limits.

Q. So that that distinguishes that policy from what some other company's policy might be? If they have different age limits that is up to them?

A. That's correct, sir.

Q. This is simply an expression for age limits for acceptance so far as you are concerned?

[fol. 122] A. Correct, sir.

Q. Exhibit 13(b), Commission's 13(b), applies to A and H or hospital and medical insurance?

A. Hospital, medical insurance.

Q. Now, during the course of your experience—first of all—strike that. For how many years has the respondent used this statement, "For employed men and women ages sixteen to sixty-nine years inclusive."?

A. I cannot answer that question. It would be the number of years we have had this policy on the market, and I don't know how long.

Q. Is it a matter of several years?

A. Yes, I would say "several" might be the proper term.

Q. In your experience during the course of thirty-one years have you ever seen a similar statement to this applied to where the ages might be changed but the statement itself, the context of the statement, might be the same? Have you ever seen that statment before?

A. Yes, sir. Many times.

Q. And over what period of time, in your experience in the industry, have you seen a similar statement?

A. I would say in the last thirty-one years.

Q. The only change that has occurred during that time would be a variation of the age brackets?

A. Correct, sir.

Q. During the course of your experience have you ever had someone come to you personally as an insurance man or as an officer or agent of the company, and say, "Mr. Korn, you advertise this policy for employed men and [fol. 123] women, ages sixteen to sixty-nine years inclusive, and you mis-represented the policy to me, because of that statement, which you set forth in the advertising." Has anyone ever come to you and told you that?

A. No, sir.

Q. Do you know, as administrative head of the Respondent, whether or not any complaints have come up to you through the different departments of the company concerning any claim by an insured that they were misled by this statement?

A. No, sir. I know of none.

Q. Now, as the administrative head of this company, do you know of any claims with reference to the first one that I mentioned about no increase in premiums—no decrease in benefits because of age? Has any claim come up to you——

A. No, sir.

Q. —through channels in your organization, that they were misled by that statement?

A. No, sir.

Q. Now, the next item which the commission has set up is one that is similar and of similar purport to the last one which we discussed. "For individuals or family groups, ages one day to sixty-nine years."

Now, the language is approximately the same, but slightly different, and would the same answers which you have given to the previous one with reference to the evolution of the age limitations for acceptance of the risk apply to this statement which I have just read?

[fol. 124] A. Yes, sir.

Q. And approximately how long have you been aware or known of this particular type of statement—and I show

you Commission's Exhibit 11(c)—from where, apparently, the Commission picked the language noted. How long have you known that type of a statement without regard to the age limitation which you indicated has varied over the years? How long have you known of that type of statement to be in existence?

A. Since the beginning of hospitalization insurance, possibly sixteen or eighteen years.

Q. During the time that you have known about that statement—strike that. Has that satement, modified as the age limitations have changed, been used in advertising during the course of that period?

A. Yes, sir.

Q. And during that period of time has anyone come to you as an insurance man personally or as an officer or agent of this company, the respondent, and indicated to you that they have been misled by that statement in the advertising?

A. No, sir.

Q. Has anyone in your organization indicated to you—coming to you through channels as the administrative head of the respondent—that this advertising had misled people, this type of advertising, and somebody had been or had bought insurance based upon a misapprehension of the policy by virtue of this advertising?

A. No, sir.

Trial Examiner Hier: Off the record.

[fol. 125] (Discussion off the record.)

Trial Examiner Hier: Back on the record. Go ahead.

Q. (By Mr. Langs) Mr. Korn, the question has been raised about possible knowledge which you would have of complaints as the administrative head of respondent. In what way are complaints—either as to advertising or any other matter—brought to your attention?

A. By the various departments where the complaint may have arisen.

Q. Is that a policy that the company has that you have issued to these department heads to bring them to your attention?

A. If they are material, yes.

Q. And when you have made your answers in the past, as the administrative head, and that you have not received any information about complaints pertaining to this advertising, these questions which I have asked of you, you are referring to information which you have directed be brought to your attention through the different departments?

A. That's correct.

Q. And when I have asked you the question about whether you personally have received information about anyone claiming that the particular statement has misled an individual as to the policy are you using your own personal knowledge and years of experience which you have had in this type of insurance?

A. Yes, sir.

Q. While you were acting as an agency, in the agency department, how many policies, approximately—would it [fol. 126] be several thousand or several hundred—of accident and health and hospital, medical, surgical policies and so forth—were written by your agents and those who would come under your direction?

A. Several hundred thousand.

Trial Examiner Hier: That is the issuance of each one of these policies, the exact number of policies issued?

Mr. Langs: For this particular company, yes.

Trial Examiner Hier: Yes.

Q. (By Mr. Langs) How many years have you spent with the National Casualty?

A. Fourteen years.

Q. And prior to that what was your connection? What company did you work for?

A. Continental Casualty Company.

Q. And how many years did you work for Continental Casualty?

Seventeen years.

Q. So between the two companies that covers your span of experience and knowledge in this A and H business and hospital and surgical business?

A. That's correct.

Mr. King: Mr. Langs, may I ask whether his last statement had reference to experience with National? He made a statement two hundred thousand policies.

Mr. Langs: He said several hundred thousand.

The Witness: Several hundred thousand.

Mr. King: Is this when he was employed by National?

[fol. 127] The Witness: That's right, with the National Casualty Company.

Mr. Langs: In agency work.

Q. (By Mr. Langs) And during the course of your experience as the one directly responsible for selling these policies, these statements were a part or statements of similar purport were a part of the advertising literature which was used during your term in the agency department, is that correct?

A. That's right.

Q. So that when you speak of not having had personal knowledge or not having knowledge either as an administrative head which you have been recently during the past few years, it grows out of your experience covering these many hundreds of thousands of policies which were issued by the Department which you managed during a certain number of years, is that correct?

A. That's correct.

Q. And it also covers your individual knowledge of the business for a matter of thirty-one years?

A. That's correct.

Q. Now, the next item which the commission has set forth is, "I understand this peace of mind and security will be mine from the first day; even for life." And apparently they picked up that information from Exhibit 6(i), Commission's Exhibit 6(i), and I show you Exhibit 6(i).

That circular or little memo I believe has to do with benefits, is that correct?

[fol. 128] A. That is correct.

Q. In other words, that particular memo assumes that there is an insured, and he has a policy and he has received an accident which is covered under the policy, and then it describes the benefits which an insured would receive, is that correct?

A. Yes.

Mr. Brookfield: Mr. Examiner, I have to object to that question. I think this exhibit speaks for itself.

Trial Examiner Hier: Well, I don't know that he can't say what he had in mind when he wrote it or had it written. I think the exhibit speaks for itself. I am—like you are—bound by the exhibit. Everybody can draw their own inference from it. The answer may stand. Go ahead.

Q. (By Mr. Langs) During the——

Mr. Langs: I believe, your Honor, that in the complaint they have selected this particular statement out of context, and I think a reading of the complaint will indicate this, as an indication that the policy itself will be a continuing policy; that the security goes to the policy and they have paid no attention to the fact that the letter or the particular comment refers to benefits. I appreciate that is argument that we will have to present as to our conclusion or position as to the particular document.

Nevertheless, I simply want this man to identify this particular exhibit, and its use so far as the company is concerned.

Trial Examiner Hier: His whole argument around Sec-[fol. 129] tion 1 in Paragraph 3, as I see it, their contention that the statements quoted raise an inference of non-cancelability, is that right?

Mr. Brookfield: Yes.

Trial Examiner Hier: They don't cancel anything else because the policy they say——

Mr. Langs: That's the point I wanted to bring out here—that this has nothing to do with cancelability at all. The only thing it has to do with is in connection with benefits.

Trial Examiner Hier: All right.

Mr. Langs: Once the claim has been allowed, the benefits will go on for the man's life. The statement is a true statement as to benefits.

Trial Examiner Hier: All right, go ahead.

Q. (By Mr. Langs) Mr. Korn, again referring to Exhibit 6(i), Commission's 6(i), that covers what, again? What is the main point of discussion? Is it policy, benefits, acceptance, or what?

A. As I read it, when I am sick, when I get hurt, the benefits are stated thereunder, under each of these captions,

and the sentence to which you refer, the quote to which you refer, follows immediately thereafter. If you read the first sentence, "Without obligation, tell me how I can have six hundred dollars a month", I can't see anything other than it refers to the benefits as exhibited in this article.

Trial Examiner Hier: Let me see it.

The Witness: They are not speaking of the policy. They are speaking of benefits.

[fol. 130] Q. (By Mr. Langs) Was that the intent of the company, the Respondent in this case, in publishing that information?

A. That is correct.

Q. That was directed to the benefits?

A. Correct.

Q. And it has nothing to do with acceptance age, does it?

A. I see no reference in it, in that particular——

Q. That has nothing to do with whether a person receives a medical examination or not? Nothing about that in there?

A. I didn't review the entire piece. There is something at the bottom, yes.

Q. There is something at the bottom?

A. Yes. "No medical examination required".

Q. That indicates—we will come to that when it comes up a little bit later, but so far as you are concerned, it covers the benefits that this company would pay under a policy?

A. That's correct.

Q. It wasn't put out for any other purpose?

A. No, and I think that is exemplified by even the extent of the style of type. It appears as the man's own statement.

Q. Now, again, in the evolution of benefits, in this type of policy, what has been the experience of the industry as to the type of benefits or the amount of benefits that were paid in years gone by and the evolution of those benefits? Have they increased or decreased? What has been the program?

[fol. 131] Mr. Brookfield: Mr. Examiner, I renew my objection to this type of testimony.

Trial Examiner Hier: Well, Mr. Brookfield, I might as well tell you now this may be the first case to reach the

Commission. I don't know. There are thirty-one of these cases pending. While I may agree with you slightly or to some extent on some of your objections, I do think the insurance industry as a whole—and this respondent in particular—should have as full a picture as possible before the Commission, even though some of it may be technically irrelevant or actually irrelevant and immaterial under ordinary false and misleading advertising rules, and for that reason I am going to overrule this objection and extend to the respondent as fairly good leeway in presenting its picture because, as you know, there is but one single man on that Commision today who has had any appreciable amount of experience in false and misleading advertising cases,—just one.

I am going to allow this in. Go ahead.

Q. (By Mr. Langs) My question, Mr. Korn, concerned the evolution of benefits as may have been developed by the industry in the past as compared to the present. Will you indicate such evolution as you have indicated in the other type of policies?

A. As the industry progressed, I am speaking of the accident and health industry, there has been liberalization, increased benefits, more coverage, greater age acceptance of risk, greater span of age acceptance of risks. It has been the evolution in the insurance industry.

Q. As these benefits have changed from time to time have [fol. 132] different companies set up different benefits?

A. Yes, sir.

Q. Has it been necessary for your company to indicate your benefits as distinguished from what they might read as to benefits by some other company?

A. Yes, sir.

Q. And referring to Exhibit 6(i), Commission's 6(i), does that indicate the benefits under several different circumstances that a person would receive?

A. That's correct.

Q. And am I correct in assuming that as to some other companies the benefits might be different?

A. That's right.

Q. That is simply an indication, then, of the benefits which this company would pay?

A. That is correct.

Q. Now, has anyone, Mr. Korn—as to your personal knowledge in the insurance business—strike that. Let me ask it this way: Has it been common practice during your years in the insurance industry, this particular industry, to establish—or not to establish, but to set forth to the public, the people that are going to buy the type of benefits or the amount of benefits that an insured could receive under any given set of circumstances.

A. That is correct.

Q. In other words, that has been an advertising method [fol. 133] which has been used for all of the years you have been in the insurance business?

A. It has been a common practice to set forth the benefits available if such were desired under a given policy.

Q. And that has been the—that practice has been used for the purpose of distinguishing a particular company's product from another company's particular product; namely, the benefits.

A. That is correct.

Trial Examiner Hier: Mr. McQuire, would you like a recess? You, Mr. Korn?

The Witness: I am perfectly willing to go on.

Trial Examiner Hier: It is all right with me.

Q. (By Mr. Langs) Now, during your experience in the insurance business, and your personal knowledge, has anyone come to you, Mr. Korn, and said that "I bought a policy based upon material set forth in Exhibit—or similar material set forth in Commission's Exhibit 6(i)"—and said, "Mr. Korn, I was misled in buying a policy based upon this advertising"?

A. Not to my knowledge.

Q. This comes to your personal knowledge. Anyone ever come to you, personally?

A. No, sir.

Q. Now, has any information come to you through the administrative channels of the respondent that any claim has been presented on the part of an insured that the advertising material used in Exhibit 6(i) has misled them in buying a policy?

A. No. My attention has not been called to any.

[fol. 134] Q. I believe you testified that information pertaining to benefits has been used as an advertising medium all during your experience in the insurance business?

A. That's right.

Mr. Langs: Mr. Examiner, I would like to, at this time—we have brought in a man who operates a very large agency in Detroit, and in order to conserve his time I would like permission to withdraw Mr. Korn at this point and put on Mr. Tolmich because we have indicated to him that we would try to accommodate him as to his time if we possibly can. This examination will be along similar lines, but not quite as detailed, and will be substantially shorter than Mr. Korn's.

Trial Examiner Hier: Do you gentlemen have any objection?

Mr. Brookfield: I don't think so.

Trial Examiner: All right, let the record show, Mr. McGuire, that Mr. Korn is temporarily excused as a witness for the purpose as stated by Mr. Langs.

[fol. 135] Ben Tolmich was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Langs:

Q. Mr. Tolmich, will you state your full name for the record, and the Examiner?

A. Ben Tolmich, T-o-l-m-i-c-h.

Q. Where do you reside, Mr. Tolmich?

A. Detroit, 18604 Cranbrook Drive.

Q. How long have you lived in Detroit?

A. Since 1916.

Q. How many years have you spent in the insurance business?

A. This is my thirty-fourth year.

Q. And during that course of time—the thirty-four years—what type of work have you done? What type of insurance work have you done?

A. I have sold life insurance and accident and health insurance.

Q. And have you sold hospital insurance?

A. That is included in the accident and health.

Q. When you refer to accident and health you are taking its broad scope of hospitalization insurance?

A. That's correct.

Trial Examiner Hier. Are you what they call a broker or a general agent?

[fol. 136] The Witness: I am a general agent for a life company and the National Casualty.

Q. (By Mr. Langs): As a general agent what are your duties?

A. To sell, hire agents to sell, to supervise the men's activities, and number one should have been, to give service to the public on the policies that we have in force.

Q. During your years—thirty-four years—how many of those years have you acted as a general agent?

A. As a general agent I started thirty-two years ago, life insurance general agent.

Q. How many years have you been a general agent for accident and health type of insurance?

A. This is the seventeenth year.

Q. Where has your business as a general agent been during that thirty-two year period?

A. Where?

Q. Yes.

A. In Detroit.

Q. All of your time has been in Detroit?

A. All of it.

Q. Where is your office located?

A. Two years ago I moved out on James Cou-ens, which is 18604 James Couzens.

Q. And how many agents do you have that work for you in your capacity as a general agent?

[fol. 137] A. There are different categories, direct agents that are housed in my office are ten. I have many agents of other companies writing business through my office.

Q. As one of your functions as a general agent have you sold insurance yourself personally?

A. I certainly did.

Q. And have you sold accident and health type of insurance?

A. I have.

Q. And how many hundreds or thousands of policies would you say that your particular general agency has written approximately on accident and health type of insurance?

A. I would guess about fifteen thousand.

Q. And have you had an opportunity, Mr. Tolmich, to watch the evolution of Accident and Health Insurance over the last many years or during the number of years that you have acted as an insurance broker, insurance agent?

A. Yes, sir.

Q. Has there been a change in the type of policy—that is, the liberalization or benefits or coverage—during the time that you have had experience in the insurance field?

A. Yes, sir, there has.

Q. Can you indicate for the record and for the benefit of the Examiner your information taken from your personal experience as to the method of program of selling an A and H or accident and health policy?

A. I don't quite know exactly what you mean.

[fol. 138] Q. Well, how would you get your lead and what would you do with the lead, and how would you proceed up to the point of having closed a deal to sell a policy and have it concluded and accepted by the National Casualty Company? Start from the beginning and go right through until the premium has been collected, the policy has been accepted, and everybody is happy and satisfied.

A. The hospitalization service has become so big that we started to advertise for prospects and we sent out literature giving people an idea of what we have to offer, and then we would go out when they showed an interest, explain the coverage, explain the exclusions, and then ask them whether they could qualify for it. As a matter of fact, the phrase, "Let's see if you can qualify" is an accepted sales procedure by most companies.

Once they have agreed to qualify we start on the application. Do you want that much detail?

Q. Yes, I want all of the detail. You give it to me just like it happens.

A. Then we get all of the information, and when we write it up we ask them to read over the questions on the

applications, whether they are correctly answered, and then ask them to sign it if it is correct, if all of the answers are correct, and of course the one that we are very careful to point out is—I believe it is the last question—and that is, "Do you understand——" What is that question? It has to be so, what you say. Otherwise, there is no benefits, or some such.

Q. This may be what you are referring to. I show you, [fol. 139] Mr. Tolmich, Commission's Exhibit 15(b), and it is also labeled Commission's Exhibit 18(b), which has an application form on the reverse side of that exhibit.

A. Oh, yes. Question 14. "Do you agree that the falsity of any answer in this application for a policy may bar the right to recovery there under, if such answer materially affects the acceptance of the risk or the hazard assumed by the company?" In other words, it is explained that they must tell the truth. I don't know whether that is pertinent or not.

Q. That's what you referred to a moment ago when you said this last question?

A. Yes.

Q. All right. Go ahead.

A. All right. When the policy is issued it is delivered by the agent. We keep a record of each policy. We send out notices of premiums, send out receipts, collect the premiums, remit it to the company, and then give the necessary service to the policy holder, such as providing him with claim papers and answering questions regarding claims and such, and there are various other services usually that come up.

Trial Examiner Hier: You used the expression, Mr. Tolmich, "We send out literature to prospects". Is the literature you send out that which is composed by the National Casualty Company, or is it your own composition, or both?

The Witness: It is passed by the National Casualty Company.

Trial Examiner Hier: That may be true. That implies to me that some of it is of your own composition, which you [fol. 140] get them to approve before you send it out. Is that correct?

The witness: I make suggestions. They make the composition.

Trial Examiner Hier: They make the composition?

The Witness: They print it, and then let me have it for use, distribution.

Q. (By Mr. Langs) Now, you say you make suggestions; you, being out on the firing line, attempt to give them suggestions on points which you feel might be helpful in distinguishing the policy of this company from other companies, or what type of suggestions? Why do you give suggestions to the company?

A. Fine. I have attempted in the past to suggest to the National Casualty Company to use certain phrases that I have seen other companies use, which they refused time and again. That was one type of suggestion. The others were merely pointing out coverages that our company has, and privileges that our company has that other companies do not.

Q. In other words, you wanted them to point out the distinguishing marks of the National Casualty product, as compared with some other company's product?

A. That is correct.

Q. Now, as a selling agent, has the National Casualty Company furnished you with specimen policies for your use in selling?

A. Certainly. Every agent has that.

Q. And when you are talking with a particular prospect about a particular type or kind of insurance, is it discussed with respect to the specimen policy that is given to you [fol. 141] by the National Casualty Company?

A. That is the most convincing way of selling. I show him in black and white exactly what is going to be given to him. That is the way we use it.

Q. Do you review that with the prospect at the time you are attempting to sell it?

A. Yes, and that also, incidentally, is a very good selling. —I am speaking now from a sales standpoint—is to show them what they will not get, and it has a very desirable effect in the sales procedure, by saying "Now, this is what is not permitted", and then you read usually the paragraph of the exceptions.

Q. You mentioned a moment ago the fact—something about claims. One of the insured, one of your customers, if they have a claim or are ill and have benefits coming under the policy which you have sold, does he come into your office

or call you on the phone and say, "I am in a certain hospital", or come in and talk to you about the claim?

A. Certainly. A thousand—well, many, many hundreds of times, I will say.

Q. Isn't it true that in probably ninety-nine and a fraction per cent of the cases that the claim comes to your office first? The person that you contacted is your personal friend, your customer. He comes there first with the claim, and then it is referred into the home office?

A. That is true, because we send out the notices, and they have our address and telephone number, and therefore they contact us first.

Q. Now, that gets us down to certain items which I want to cover quickly. The National Casualty Company has been [fol. 142] complained against by the Federal Trade Commission with reference to certain comments which appear in advertising, and the first one they have raised a question about is with reference to the statement, "No increase in Premium because of age—No decrease in benefits because of age."

Now, Mr. Tolmich, are there policies of which you have knowledge, either at the present time or have existed in the past, that provided for increase in premiums or decrease in benefits at specific age limits?

A. Yes.

Q. You have knowledge of that?

A. Certainly.

Q. In the beginning of the A and H business the—what is your recollection of whether the policies more generally had an increase in premium at specific ages and decreases in benefits at specific ages, as compared to what we will call a level premium? Which type of program?

A. Thirty-odd years ago neither one, because they didn't write them past fifty-five or thereabouts.

Q. There was that limitation in there?

A. That's right, and then they started to write them to an older age, and some companies had either an increase in premium or a reduction in benefits. I think a reduction in benefit is what it usually was, if I remember right.

Q. And then in more recent years this so-called level premium—that is a premium which was permanent—has

[fol. 143] developed as compared to the former procedure, is that correct?

A. Not all companies.

Q. No, I don't mean all companies, but it has become more prevalent?

A. Yes.

Q. So today there are two types of insurance. That is, in this particular field. Now, we are confining all of our discussions to the A and H field?

A. Yes.

Q. There is a type which has a level premium and there is another type which has either an increase in premium or a decrease in benefit.

A. That is correct.

Q. So that the—it is necessary for the company to indicate in its advertising some way as to which plan it is following?

A. Yes.

Mr. Brookfield: Mr. Examiner, I think I will object to this type of questions. I have refrained from objecting to leading questions in the past, but this is not——

Trial Examiner Hier: You are objecting to the fact the question is leading?

Mr. Brookfield: Yes.

Trial Examiner Hier: Yes, it is leading. I will sustain the objection.

Mr. Brookfield: Not only this, but a number of others to which I haven't taken exception.

Trial Examiner Hier: While Mr. Langs is looking [fol. 144] through his notes, Mr. Tolmich, I would like to ask you some questions. I assume that, from what you have said, you do not attempt to sell illiterates?

The Witness: Illiterates don't usually buy.

Trial Examiner Hier: That's what I want to find out. Now, do you restrict the range of your prospects? That is, those to whom you attempt to sell—to any particular income bracket or any particular educational bracket?

The Witness: We don't have any way of limiting the educational bracket, but usually the income bracket we attempt to cover those who have a need for this type of protection over and above what they now get in these fac-

tories. Therefore, it would require them to earn a little above the average.

Trial Examiner Hier: What is the average? I don't know what you are talking about?

The Witness: Today we find the average runs something about five thousand dollars.

Trial Examiner Hier: You don't attempt to sell anybody who makes less than that?

The Witness: No, that is not so. We have no way of knowing, but when a man is making or taking free coverage, and he already has his group coverage, he don't need it and he therefore won't buy it. We don't attempt to sell it. When we find someone that is in need over a reasonable amount of what he is already covered for then we of course attempt to sell him.

Trial Examiner Hier: You say he already has this group [fol. 145] coverage but there are, I suppose, a number of prospects in Detroit who do not have group coverage, who do not work in factories. Waitresses, cab drivers, perhaps? I don't know.

The Witness: Yes.

Trial Examiner Hier: Do you reach those people?

The Witness: Not cab drivers. Very few waitresses. Mostly the working people, the only ones we can reach by mail.

Trial Examiner Hier: Go ahead.

Q. (By Mr. Langs). Now, I show you exhibit 6(j), Commission's Exhibit 6 (j), Mr. Tolmich, and refer you to the statement in the lower portion of this, which reads, "No increase in premium because of age—no decrease in benefits because of age". Over what period of time have you seen that language or similar language to that used in either advertising or discussion of the A and H policies with prospective customers?

A. That question is what, sir?

Q. Over what period of time, how many years, have you seen this distinguishing mark?

A. Many, many years, as far as I can remember. I can't tell you exactly.

Q. I don't mean exactly. I mean approximately. Would you say it is ten years, fifteen years?

A. It is at least in the last ten years that I can remember.

Q. In other words it is a matter of many years that that comment has been used to distinguish a so-called level premium policy from one that has an increase in premium or a decrease in benefit policy?

[fol. 146] A. That's right. The reason that has been used in the past by other companies, I might enlighten you. So many companies who increase the premiums would advertise "No decrease in benefits". Other companies who decreased the benefits would advertise, "No increase in premium because of age". Therefore, when we do neither, why, we had it printed. It is just the natural thing to do.

Q. All right, thank you. Now, during the course of time —the many years that this type of language has been used —has any insurance customer, a person you have sold a policy to, or any person that has bought a policy through your agency, through one of your other agents, would come in to you and say, "Mr. Tolmich, I bought a policy here because of the language, 'No increase in premium because of age—no decrease in benefits because of age', and I was misled by those words in buying this policy."? Has anyone ever come to you and told you that?

A. No, sir. Never.

Q. Has anyone ever come to your agency and told you that?

A. To my knowledge, never.

Q. To you personally it has not come?

A. No.

Q. No information?

A. No.

Q. In all of your years in the insurance business?

A. That is absolutely true.

Q. Now, I show you Exhibit 13(b), Commission's 13(b), and on the bottom of this particular form we find the language, "For employed men and women ages sixteen to [fol. 147] sixty-nine years inclusive". I believe you stated a while ago that this age limitation for qualification has varied. Years ago it was fifty, or something like that, and it has changed. Is that correct?

A. That's correct.

Q. During what period of time have you had experience in seeing this particular type of statement? That is, that the age limits may have changed during the course of years,

but what period of time have you seen some statements similar to that which established the qualification of acceptance to an insurance policy?

Mr. Brookfield: Mr. Examiner, I don't think he testified he had seen that particular piece of paper.

Mr. Langs: I am asking him during what period of time he has seen that statement.

Trial Examiner Hier: Have you seen it?

The Witness: This phrase?

Trial Examiner Hier: Yes.

The Witness: Oh, many, many times.

Trial Examiner Hier: For how long?

The Witness: At least ten years or more.

Trial Examiner Hier: All right.

Q. (By Mr. Langs) During the course of time have you seen different age limits set in a statement similar to that?

A. Certainly.

Q. And have you communicated to prospective customers [fol. 148] any information about those age limits? When you have talked to a customer have those age limits meant anything?

A. When we go to a prospect to sell them a policy we fairly well establish his age, and therefore whether—as long as he is between the ages of sixteen and sixty-nine—there is no discussion necessary.

Q. In other words, that is the acceptance age for qualification?

A. Of course. It used to be twenty to fifty-five. Now we have a sixteen to sixty-nine. There are some companies that go as high as eighty, I understand, and that is the only way we can eliminate people from becoming interested in this particular service if they are not in that age bracket.

Q. That is the purpose for which this statement is used?

A. That is, as I understand it.

Q. During the course of your experience has anyone come to you, Mr. Tolmich, and said, "I bought a policy from you personally or through one of your agents, and because of this statement, 'For employed men and women ages sixteen to sixty-nine years inclusive', I was misled in buying your policy."?

A. No, sir.

Q. Now, I show you Exhibit 6(i), Commission's 6(i), and ask you to note down in the lower portion of it a part, "I understand this peace of mind and security will be mine from the first day, even for life."

Now, this particular exhibit has been—well, first of all—

A. May I read it? I have never seen this particular folder. I have seen that statement, "Peace of mind and security will be mine from the first day, even for life". It [fol. 149] is what we call in the sales jargon as appealing to the heart by telling them that in case of an accident, in case of sickness, they will be protected. Of course we always refer to the things that they are not protected for in the policy, but according to the contract we use this statement time and time again; "In accordance with the provisions of the policy." That is being used constantly.

Q. That covers, then, I take it, the benefits which one would receive,—refers to benefits one would receive in the vent of accident or illness?

A. That's right.

Q. And the security or peace of mind for life covers the benefits one would get after the injury or illness?

A. Of course. How else could it?

Q. I simply want your statement on it; what you would understand it to be.

Now, you indicate that you have seen that statement. Not in this particular literature but in other items, for some period of time. How long would you say that you have seen a similar statement to that? For what period of time? How many years?

A. Well, I would say as far as I can remember at least ten years.

Q. And during the period of time that you have sold A and H policies where this statement has been used, has anyone come to you and said, "Mr. Tolmich, I bought a policy from you and this particular statement misled me in buying this policy."?

A. No, sir. Never.

[fol. 150] Q. Has any agent of yours ever presented to you any contention by a customer that they had been misled in buying a policy using this particular language in the advertisement?

A. I have never been told that.

Q. Now, also, Mr. Tolmich, do different companies have different benefits?

A. Yes.

Q. And is it customary or the practice for the National Casualty to indicate its benefits as distinguished from the benefits which some other companies would offer?

A. Yes, of course.

Q. And Commission's Exhibit 6(i)—which, of course, speaks for itself—sets forth certain benefits that would be received under certain circumstances. Has that been a customary practice of indicating the benefits which National pays as distinguished from other companies in your select program?

A. Of course!

Q. Now, we come to one, Mr. Tolmich, that has been set forth by the commission. "No medical examination required".

Now, in your experience as an insurance man—and you have had experience both in the life field and the accident and health field—are there types of insurance in which a medical examination is required before a policy will be issued?

A. Yes, the life insurance applicants must be examined. As a matter of fact, all life insurance applicants used to be examined and there being—up until fifteen or twenty [fol. 151] years ago, there was very little accident and health insurance sold. Most people understood that to buy insurance of a personal nature requires an examination. Our policy does not. There are some accident and health policies that do.

Q. So that this is a statement that no "medical examination required" is simply a statement of actual facts which exist as far as this company is concerned?

A. That's right.

Q. As distinguished from what some other company might require?

A. That's right.

Q. Now, this statement "No medical examination required", how many years have you been familiar with that statement or the use of it in the selling of A and H policies?

A. Oh, twenty-odd years.

Q. And you mentioned that there are certain policies—A and H policies—where a medical examination is required. What type of policy—or is there a particular type of policy—that does require medical examination for A and H?

A. It is known as the guaranteed renewable type of accident and health policy.

Q. Or sometimes referred to as non-cancellable insurance?

A. That's right.

Mr. Brookfield: Mr. Examiner, I think Mr. Langs' questioning—he is testifying, himself. I ask a continuing objection to this line of examination.

[fol. 152] Trial Examiner Hier: Sustain the objection, Mr. Langs. The questions are leading.

Mr. Langs: The second question, I don't think perhaps was leading.

Trial Examiner Hier: Perhaps not, but this last one was; this last one was leading. It takes longer to go the other way. If he feels that is what should be done I will have to sustain him.

Q. (By Mr. Langs) You mentioned that this one policy, where medical examination was required, was a guaranteed renewable policy. Does that policy have any other type of name?

A. It is known as the non-cancellable health and accident policy.

Q. What, in the industry, does the use of this statement, "No medical examination required",—is it used in any way to make a distinction between the two types of policy?

A. The question is, is that statement used to make a distinction?

Q. Does that indicate a distinction; indicate—"no medical examination required"—does that indicate the policy that uses that or the advertising that uses that is one type of policy, and the other where it is not used is another type of policy?

A. As an insurance man that is the way I have always known it, of course.

Trial Examiner Hier: The purpose of a medical examination, Mr. Tolmich, is to uncover latent disabilities which might increase the risk?

The Witness: That's correct.

[fol. 153] Trial Examiner Hier: It strikes me, as a layman—since I know very little, if anything, about insurance—when you say "No medical examination required", that gives rise to inference in the mind that they take you as is.

The Witness: I don't know what interpretation can be put on it. All I can tell you is my experience. When we speak to a person about buying an accident and health policy, always we use the phrase—"If you can qualify". That means if he can answer those questions, and the company accepts him on these statements. You might read it and put another interpretation on it, but from my experience they can't do it because they do not buy that. They buy when the salesman explains the coverage. So in our experience, "No medical examination required", that merely means we do not send a doctor around. We take the necessary information.

Trial Examiner Hier: All right.

Q. (By Mr. Langs) Has anyone, Mr. Tolmich, during your experience, come to you—and paraphrasing the question a little bit which Mr. Hier has asked you—said, "Here, you advertised 'No medical examination required', and I gave you this information in answer to the specific questions about illness and so forth"—he said he didn't have any or that he may have made some statement that was not correct, but later on he comes back and says, "Because you advertised 'No medical examination' I understood you to mean that you were going to take me, even though I was ill and suffering from some particular disease, and therefore you misled me by the use of the word or term 'No medical [fol. 154] examination required'."

Has anyone ever come to you in your experience and told you that?

A. Not once.

Q. Has any claim or such a contention ever come to you through any of your agents?

A. No, sir.

Q. Has anyone ever indicates to you, as the customer, that you were selling, at the time you were attempting to sell him, that your statement "No medical examination required"—said to you, "I understand by this fact that I don't have to take a medical examination. You are going

to take me whether I am well or ill." Have they ever told you that?

A. We have never had anyone question that, because we used the phrase in our presentation that "If you can qualify", which means that he would have to pass the questions on the application and therefore that question has never come up.

Q. Now we go on to another type of question, several of them, which are of similar purport, which the Commission has raised, as follows:

"The most complete coverage at the lowest rates: Monthly benefit up to three hundred dollars per month paid from the first day of any sickness or accident plus three hundred dollars per month for hospitalization."

Is it true that the National Casualty Company sells a policy or has a policy for sale that pays benefits up to three [fol. 155] hundred dollars per month?

A. Yes, it is.

Q. And is it true that they also have a policy which covers up to three hundred dollars per month for hospitalization?

A. Oh, yes.

Q. Now, the policy itself, does it—the exhibit which is set forth as to the medical and surgical benefits—it enumerates the specific item and the amount to be paid. Does that indicate in that particular amount the three hundred dollars at that point?

A. You are referring to the surgical, hospital or accident-health indemnity?

Q. The surgical and hospital where they have a list of surgical benefits.

A. Surgical benefits has a one hundred fifty dollar schedule, reduced, and then we sell either that which is called one hundred per cent or two hundred per cent, is it? No, one hundred fifty per cent, which is a maximum of two and a quarter; or two hundred per cent, which is three hundred dollars down.

Q. Now, When you say "three hundred dollars down", what do you mean by that?

A. Well, three hundred dollars for the major operations, and smaller amounts for the less costly ones.

Q. Now, has anyone come to you, Mr. Tolmich—first of all, may I ask you this: The method of describing in literature the maximum benefits which a company would pay [fol. 156] for particular claims, has that been used generally in the advertising material submitted by insurance companies?

A. The method of describing, did you say?

Q. The benefits, describing the benefits.

A. Oh, that is common practice. That expedites the explanation of the coverage until we get to the closing when we show them the exceptions.

Q. Now, how long, to your knowledge, has this use of benefits—and in this case we are talking about the monthly benefits—either in a so-called accident and health or hospitalization—how long, to your knowledge, over what period of years, has that technique or approach been used in the selling of insurance, saying "Our benefits are so much"?

A. That's for the past thirty-odd years, since I have been in insurance, I have seen that.

Q. Has anyone come to you, Mr. Tolmich—I show you Exhibit 6(j), Commission's 6(j), and refer you to the statement which appears in the upper part, which has been circled. Will you just read that statement?

A. The most complete coverage——

Q. Read it to yourself. You don't have to read it outloud.

A. I see. All right. Yes, sir.

Q. Have you seen a statement similar to that at any time during the course of your experience as a salesman of insurance? One of similar purport? Maybe not the exact working, but one of similar purport?

A. Of course I have seen lots of literature that is de- [fol. 157] scribing the features of a policy, and unless you make it glowing you are not—it has no value; as long as it is honest, to me, that is factual.

Q. Now, that is a description of benefits, basically that is what it amounts to, is that correct?

A. Yes.

Q. You have seen a statement describing benefits as a means of selling over, you have indicated, some thirty-odd years?

A. Correct.

Q. And you know that the policy which the National Casualty puts out does provide for the benefits which are set up here in Commission's Exhibit 6 (j), is that correct?

A. That's correct.

Q. Has anyone ever come to you and indicated that during the course of your experience over the past many years, "Mr. Tolmich, I bought an insurance policy, and your advertising, you advertised that I would receive certain benefits as described in this exhibit, Commission's 6 (j), the language used, and you misled me. I was misled in buying the policy because of that advertising." Has anyone ever come and told you that?

A. No, sir.

Q. Has anyone ever told your agents, who, in turn, have brought the information to you that they were misled by that?

A. Never. I wonder if I could just make an all-covering statement?

Q. Yes, go ahead.

A. I would not tolerate any misleading statements in my [fol. 158] office, and I am merely prefacing this to say that at no time has any policy-holder questioned any of the literature as being misleading to them, at no time, any of it.

Trial Examiner Hier: I take it gentlemen, you gentlemen representing the government, that there is no contention on your part that this respondent has misled or misrepresented or deceived intentionally? The question here is what is and what is not misleading. Isn't that really the crux of this thing?

Mr. Brookfield: The commission of course repeatedly has held intention has no part of a Federal Commission case.

Trial Examiner Hier: I know that, but I wonder if there is any confention or intention implicitly charged.

Mr. Brookfield: I don't think so.

Trial Examiner Hier: All right, you may forget about that, Mr. Langs. It is not charged by application or inference that this company has intentionally misled anybody. The Hearing Examiner first makes up his mind

whether there is a reasonable probability the advertising will mislead, and then various people above him either agree or change or modify or something else.

Mr. Langs: May I make this observation. This evidence which we are producing at this point is not primarily for the purpose of showing the intent, that we intended to deceive. We of course deny we ever intended to deceive, and there can be no question that we ever intended at all, but it goes beyond that to a point which I think is very important; namely that here, we will have three witnesses, and their [fol. 159] experience is going to run almost a hundred years, and their knowledge of what the people reacted to in the past many years, to certain statements, we believe is important in determining the proper application or the proper construction to be given.

We do not believe that you can simply strike out and say to the people of the United States, "You didn't know what you were taking. You didn't know what you were buying. You didn't know. You weren't intelligent enough to understand."

Here is actual experience of these statements that I believe must be accepted as evidence, and good evidence, by the very people that the Commission is charging us with misleading, that they have not been misled.

Now, this is not a new product where a company comes out with a new product or a new statement for the first time, and blasts it out, and may be misleading or it may not be misleading, and all of a sudden everybody jumps on them and says, "You are sending out, you are putting out a false drug, a drug that has false advertising on it, and someone is going to be injured or something like that". This is entirely a different situation, and this is evidence to support our position that these people have so construed it, and therefore is evidence directly in line with the defense which we must put in. That is the important part of this. Not the question of intent. I do not understand they have raised any question of our ethics in this situation. Our ethics, I believe, have been the very best, and if I am wrong on that I want the Commission to indicate to me now so we can put evidence on that in.

[fol. 160] Trial Examiner Hier: No, I have no question in my mind about your ethics or your intention.

Mr. Langs: But the question here which you, as the Examiner, and later the Commission and so forth, have to decide, is what is the effect of this language. These statements of these people as to what the very persons who have been concerned with it—how they felt about it—how they reacted—is evidence, and very, very excellent evidence in my opinion as a lawyer. That's all we are using this for.

Trial Examiner Hier: Since we have already interrupted these gentlemen I will continue with this question. Mr. Tolmich, I have heard it said that in the sale of insurance the initial impression on the prospect is most important. Has that been your experience or not?

The Witness: The initial impression of the presentation or the agent's appearance?

Trial Examiner Hier: No, No. Not the agent's appearance. The initial impression as to advertising, either oral or documentary, which it makes upon the prospect, is the most important impression he receives at any time during any discussion, or leading up to a purchase or a refusal to purchase. Has that been your experience?

The Witness: The first impression is rather intriguing, but whether it is important, it is important to the eventual sale, but whether that is the thing that stays in his mind after the buys the policy, I can't see that.

Trial Examiner Hier: No, I don't mean after he buys it. That is the most important impression leading up to [fol. 161] the sale of the policy.

The Witness: That is the purpose, it is true. Interest.

Trial Examiner Hier: Very well. Off the record.

(Discussion off the record.)

Trial Examiner Hier: All right, Mr. McGuire, back on the record.

The Witness: For your information, while I am considered a large agency in accident and health, it is only twenty per cent of my total business. The other is life insurance.

Trial Examiner Hier: All right.

Q. (By Mr. Langs) Following this line of questioning which the Examiner has asked you, just a moment ago, what—strike that, and put it this way: Is there any benefit to the agent from the standpoint of his time, or anything else, that is accomplished by this advertising or similar ad-

vertising, or as to the insured or the person you are trying to sell; as to his interest or time? Is there any relationship as to those two points that are accomplished by this advertising, and if so, what?

A. The problem of the salesman is to find people to talk to who will qualify within the age bracket, the earning bracket that we are interested in contacting. This age in a selection of the type of prospect that we are looking for, and enables that type of prospect to get the protection that he would not otherwise get if he wasn't interested through this medium. Do I answer your question?

Q. See if I understand what you have said correctly. This is, then, to find the person who has an interest in this type of insurance: Number 1, so that his time and the time [fol. 162] of the agent is not taken up on something that the prospect is not interested in.

A. That's correct.

Trial Examiner Hier: Or can't quality for?

The Witness: Yes. Naturally.

Q. (By Mr. Langs) Now, I refer you to another statement, and I hand you certain exhibits, Commission's 15 (e) and Commission's 18 (g), Commission's 15 (g) and Commission's 18 (f), and they contain two statements pertaining to surgical bills and hospital room and board. I wish you would read those two statements that have been circled. Apparently the Commission has picked the language which they use from those statements, which reads as follows:

"Hospital room and board for one hundred days for each sickness or accident. Your choice of plans paying from five dollars to twelve dollars fifty cents per day. Pays full benefit even if your hospital room costs less."

Are you familiar with that statement?

A. Yes, I am.

Q. Is that type of statement used by you and your office in selling that type of insurance?

A. Yes.

Q. It has been?

A. Yes, it has been.

Q. Does that indicate the benefits which are payable under those policies?

[fol. 163] A. Yes. Not only does it indicate the benefits, but it also indicates that whereas other companies will only pay up to the expense, we will pay, regardless of their expense, so much per day.

Q. In other words, again this is a distinguishing mark?

Mr. Brookfield: Mr. Examiner, I move that answer be stricken. The paper speaks for itself. He can't explain the terms of a written instrument.

Mr. Langs: He certainly can explain what he did explain. That's the heart of this whole case.

Mr. Brookfield: He has insurance experience. He is not testifying as to what the public thinks.

Trial Examiner Hier: The test is as to the impact on the public. I don't see there is any harm in letting him explain it from that standpoint in this case. You may continue.

Q. (By Mr. Langs) Go ahead, Mr. Tolmich.

A. I believe I am qualified to give you the impact on the public because I have their reaction, and this explains what National does as compared to what some other companies do.

Q. And that particular advertising gets back to this general statement which we have had before, that some companies have one benefit and other companies have another benefit?

A. Yes.

Q. This is simply the distinguishing mark of National benefits under this policy?

A. That's correct.

[fol. 164] Q. Now, how many years have you seen that statement, and how many years has that been used in the selling of insurance by you?

A. This hospital room and board is something only within the past ten years or so, ten or fifteen years, probably.

Q. Has that statement been used by you during that period of time?

A. Yes.

Q. The benefits may have been greater or smaller, as the case may be, years ago?

A. Yes.

Q. But the same provisions have been used?

A. That's right.

Q. During the course of the years, which you have had experience with this particular statement, has any policy holder come to you and said, "Mr. Tolmich, I bought a policy from you based upon this statement, and I was misled by the purchase of that policy because of this statement."?

A. No, sir. That's a true statement.

Q. Has any agent of yours come to you and indicated that he had a customer who bought a policy and the customer came and said to him and reported to you, that they bought a policy and were misled by this statement?

A. No, sir.

Q. I show you Exhibit 15 (f), Commission's 15 (f), and same appears in Commission's 18 (d), and I ask you to read the portion which is encircled, which reads as follows: "Fifteen dollars per day for hospital room and board for one hundred days, each disability."

[fol. 165] Again this gets back to the benefits which are paid, and you previously indicated that is a common method or practice of selling, to indicate the benefits of this company to that of another company?

A. That is correct.

Q. Are you familiar with that particular statement in its use of selling the National Casualty Company Insurance?

A. Yes, I am.

Q. How many years have you had experience with that particular statement, and its use in the selling of insurance issued by National Casualty?

A. Seventeen years—yes, sixteen, seventeen—this is the seventeenth year.

Q. During that priod of time the amounts may have varied?

A. That's right. A hundred days was a common practice, but the amounts were—well, at the beginning they were as low as three thirty-three. Now, as it is shown here, fifteen dollars a day, and it pays in accordance with the provision of the policy for each disability up to one hundred dollars a day.

Q. Has anyone—any of your customers—come to you at any time during the many years that this statement has been used, and said, "Mr. Tolmich, I was misled in buying your policy issued by National Casualty, where I read this statement in some advertising or literature".?

A. No, sir.

Q. Has any agent brought to you any information that they received a complaint from a customer that they had [fol. 166] been misled in the buying of this policy because of this language?

A. No, sir.

Q. I now refer you to Commission's Exhibit 11 (e) and Commission's 12 (e), and refer you to that portion which has been circled, and that language reads, "Surgical operations whether performed in or out of the hospital, are paid up to three hundred dollars, in addition to hospital benefits. Full benefits are paid to all insured members of the family group."

Are you familiar with that particular statement?

A. Yes, I am.

Q. Has that statement been used by you in the selling of hospitalization insurance and other insurance coverage?,

A. Yes, it has.

Q. And for how long a period have you been familiar with that statement and its use in the selling of policies by National Casualty?

A. Well, ever since I have been with them. Over sixteen years.

Q. And the amounts which are set up therein have varied from time to time during the course of these years, is that correct?

A. That's correct.

Q. Other than that, the basic statement itself, though has appeared in the advertising which the company has put out and which you have used?

A. That's true.

Q. During the course of this period of time have you had any experience where a customer that you sold a policy to has come in to you and said, "Mr. Tolmich, I was mis- [fol. 167] led when I bought this policy, because of the statement—because of this statement"?

A. No, sir.

Q. Have you received any complaints from any of your agents that a customer complained to them, any one of them, that they had said, "We were misled in buying your policy because of this statement."?

A. No, sir. I have had lots of people call about that coverage, asking how much they were entitled to, when a certain operation came up, and I referred them to the schedule, depending upon whether they have three hundred, two twenty-five or a hundred and fifty. I gave them that information.

Q. Well, let me see if I follow you there. Someone has called you and said, "I have a three hundred dollar surgical policy."

A. That is correct.

Q. And they want to know what?

A. Well, let's say they had a hernia operation. They wanted to know how much they were entitled to under that surgical schedule, and I would tell them.

Q. Now, I believe you have already testified that the schedule shows on its face actually a maximum of one hundred fifty dollars for certain items there.

A. That's correct.

Q. But, nevertheless, that amount can be increased by increasing the premium on the basis of two hundred per cent, and so forth?

A. That's right.

Q. So that this—the question which you received, then, [fol. 168] from the man who was insured, was applied to the three hundred dollar policy. He wanted to know what was his coverage, as to a hernia, which you used under that particular policy?

A. That is merely one. I have had many, many of them for that purpose, knowing that it is not three hundred dollars. It is according to the schedule, based on the type of operation. That is the thing involved.

Q. I next show you Commission's Exhibit 15 (e) and Commission's Exhibit 18 (g), which contains certain language. You had that once before, but another particular statement has been lifted from that, which statement is this:

"Surgery bills from five dollars to three hundred dollars for sickness or accident."

Are you familiar with that particular statement?

A. Yes, I am.

Q. How long have you know- that statement or used it in the selling of insurance?

A. Sixteen years.

Q. You have used it for the past sixteen years in the selling of insurance for National Casualty?

A. Yes.

Q. Now, the amounts which are set up in there would possibly vary from time to time, as the benefit may be liberalized?

A. Yes.

Q. Or a person bought a smaller amount of insurance?

A. Yes.

[fol. 169] Q. But the basic statement itself, you are familiar with for many years?

A. I am.

Q. And during the course of that time has any person that you have sold insurance to ome to you and said, "Mr. Tolmich, I was misled by that statement in the buying of this insurance."?

A. No, sir.

Q. Has any of your agents?

A. No.

Q. Have any of your agents come to you and indicated that they had received a complaint from persons who bought insurance, that they were misled by this statement in the purchase of that insurance?

A. No, sir.

Q. I next refer you to Commission's Exhibit 6 (f), and I ask you to read the statement which has been circled, which is apparently the place from where the Commission picked up certain language. That language reads as follows:

"Here's what we would pay you: Monthly income up to three hundred dollars for total disability from sickness paid from first day for two years with no confinement required at any time.

"Monthly income up to three hundred dollars for total accident or confining sickness disability paid from first day for as long as totally disabled, even for life."

Are you familiar with that particular language?

[fol. 170] Q. In the selling of National Casualty insurance policies?

A. I am.

Q. How long have you been familiar with that particular language?

A. For the past sixteen years.

Q. Now, the amounts which are set up in there possibly would vary from time to time?

A. Yes.

Q. But the general statement as to using the approach of benefits has been used through that period of years?

A. That's correct.

Q. Have any of the persons to whom you have sold policies of insurance come to you and said, "Mr. Tolmich, I bought that policy of insurance there from you, and I was misled in the purchase of that insurance by this statement."?

A. No, sir.

Q. Has any agent of yours who has had a customer—have they had a customer come to them and say, and it has been reported to you, that "We bought insurance, but we were misled by the purchase or in the purchase of that insurance by this statement."?

A. No, sir.

Q. I next refer you to Commission's Exhibit 21(b), and ask you to read that portion which is circled, and which the Commission has inserted in its complaint, which reads as follows:

"When you are disabled by accident or sickness, what do you need most? Cash. Economy disability [fol. 171] policy. The simple economical way to obtain basic income protection. Sound protection. Low Cost.

"For Accident: Accident income, blank dollars per month. Total Disability—full monthly benefit for twelve months. Partial Disability—one-half monthly benefit for one month.

"For Sickness: Sickness income, blank dollars per month. Confining total disability—full monthly benefit for six months. Non-confining total disability—full monthly benefit for one month."

Mr. Tolmich, are you familiar with that particular type of language?

A. Yes, I am.

Q. And have you used that particular type of language in the selling of insurance for National Casualty Company?

A. Yes.

Q. For what period of years have you been familiar with that type of language or similar language in the selling of insurance for National Casualty Company?

A. For over fifteen years.

Q. The words may have changed slightly, but the general outline has been the same except for amounts and other slight details that might have been changed?

A. Yes.

Mr. Brookfield: I object to that question as leading, for the tenth time.

[fol. 172] Trial Examiner Hier: Yes, it is leading, but this is an incidental matter.

Mr. Langs: I have got one more to cover, and I am trying to get through.

Trial Examiner Hier: You may answer.

The Witness: That's right.

Q. (By Mr. Langs) The answer is "That's right." Now, during the course of your experience you have used that in selling for how long a period of time? That language?

A. About fifteen years.

Q. And during that period of time have you had any customers to whom you have sold insurance come to you and say, "Mr. Tolmich, we bought this National Casualty policy from you, and we were misled in the purchase of that policy because of this language."?

A. No, sir.

Q. Has any agent of yours come to you and indicated that they have received information from a customer who bought insurance that the customer has claimed he was misled in purchasing insurance because of this language?

A. No, sir.

Q. One last item. I refer you to Commission's Exhibit 8(b), and ask you to note the language there which has been circled, which is apparently the place that the commission selected the statement from, which reads as follows:

"Your security, if insured or sick: You are protected [fol. 173] while at work or away from work. Benefits paid in addition to compensation and group insurance, twenty-four hours every day protection.

"Guaranteed monthly income for accidents. Guaranteed monthly income for sickness."

Are you familiar with that language?

A. I am.

Q. In the selling of National Casualty insurance?

A. I am.

Q. And for what period of time are you familiar with that language being used in the selling of insurance for National Casualty?

A. for the past fifteen years.

Q. During the course of the time that you have sold this insurance has any one of your customers purchased a National Casualty policy and come to you and said, "Mr. Tolmich, I bought a National Casualty policy through you, and I was misled in purchasing that policy by virtue of this language."?

A. No, sir.

Q. Have any of your agents come to you and indicated to you that they had a customer who purchased insurance, and after—had purchased National Casualty insurance—and stated they were misled in the purchase of that insurance by virtue of this language?

A. No, sir.

Q. Now, one last general question, Mr. Tolmich. Have you ever received from any customers to whom you have sold a National Casualty policy, a statement or a claim by [fol. 174] them that they were misled in purchasing the National Casualty policy by virtue of any misrepresentation which this company—by any representation which this company made to them by way of advertising—wherein they claimed that they purchased a policy under a misapprehension or because they contended that they were misled in buying it by virtue of the statements that were made in the advertising?

A. No, sir.

Q. Has any of your agents ever brought to you any information that any of their customers have indicated that they have been misled by virtue of any statement or repre-

sentation which has been made by National Casualty in its advertising so that the customer has said, "We have been misled in purchasing this insurance because of this statement.?" Has that ever been brought to your attention through agents?

A. The printed statement, you are referring to?

Q. I am talking about the printed statement. These things here which National Casualty puts out. Has any agent come to you and said, "The National Casualty put out a piece of literature and one of my customers has come to me and complains now that he was misled"—he or she was misled—"in buying their policy, because of that published information."?

A. The answer is "no".

Cross-examination.

By Mr. Brookfield:

Q. Mr. Tolmich, are you the agent—do you handle any [fol. 175] other life—I mean accident and health—besides National?

A. Yes, I do.

Q. What other companies?

A. Continental Casualty Company.

Q. Are they the same type of policies?

A. Same type.

Q. Is it not a fact, Mr. Tolmich, that all of these policies, this accident, health and hospitalization, the benefits are practically identical?

A. If you are referring to any specific thing that could be identical, but there are various provisions in each one. Each one has some highlights in their policy that they feature.

Q. Will you amplify that? What do you mean, that each one has some highlights.

Q. Well, they all pay, say, in an accident and health policy, a hundred, two hundred or three hundred dollars. They don't all pay from the first day. They don't all pay for a lifetime. Some pay for one year, some pay for two years, and some pay for five years. Then some take in only those who are from twenty to sixty, let's say. Others from sixteen to eighty. That's just some of the features that they have.

Q. The policy costs vary with the additional benefits?

A. That's correct.

Q. So that basically, dollar for dollar, you wouldn't get any more from one company than you would from another?

A. Well, not being an actuary, I wouldn't know that. I do know that some companies are more competitive for the same dollar than others.

[fol. 176] Q. Does National Casualty give its purchasers of accident and health more for their dollar than the Continental Casualty Company?

A. I believe so, yes. That's the reason I specialize with the National. I wrote this business with Continental Casualty before I joined National Casualty on April 1, 1939.

Q. And you continued to write all Continental Casualty?

A. All National.

Q. What?

A. I continued to do what?

Q. You said a minute ago you continued with National and with Continental Casualty.

A. Yes, because I have policy holders that I wrote before I joined National.

Q. You have written no new policies with Continental since you have been working for National?

A. With some exceptions—policies that National did not write—I wrote with Continental Casualty.

Q. Now, Mr. Tolmich, with reference to this advertising of National that you state that you mailed out, you, as a result of that mailing, received the names of prospects?

A. That is correct.

Q. Who contacted those prospects?

A. I contacted some of them. Most of them by the agents of my office.

Q. You personally go out and sell insurance now?

[fol. 177] A. Not since I am past sixty, I don't.

Q. For how long has that been?

A. Just a year or so.

Q. Do you or the home office handle the claims?

A. The home office is the final claim payer. We have contacts with these people before they make their claim.

Trial Examiner Hier: Do you pay any claims yourself?

The Witness: No, sir.

Trial Examiner Hier: Up to a certain limit?

The Witness: No, sir.

Q. (By Mr. Brookfield) How are those claims that arrive through your customers—how are they handled?

A. They call and report a claim with us. We asked them what kind of sickness or injury it is. We send them out the proper form. They often want to know what they are entitled to. We read the policy and tell them. Most of the times they just ask for the claim form, and we send it to them, and they send it to us or direct to the Home Office.

Q. Mr. Tolmich, have you had claims made by policy holders who thought they were entitled to coverage that the policies did not provide?

A. Coverage they didn't provide? I can't remember anyone referring to coverage that didn't provide. Oh, yes, I have had some people call, that's right, and say, "I have a hospitalization policy, and I am staying home. Am I entitled to anything?"

Trial Examiner Hier: I think what he means, Mr. Tolmich, is this: Have you had claims or inquiries leading up to claims or anything of that sort for illnesses, accidents, [fol. 178] and so forth and so on, which were within the policy exclusions?

The Witness: It is possible, but I don't recall any particular case of that sort.

Trial Examiner Hier: I would think that would happen all of the time. I mean, with every insurance company.

The Witness: Well, it doesn't happen as often as you might think. It is possible that people think they are entitled—usually they ask, "What am I entitled to?"

Q. (By Mr. Brookfield) Mr. Tolmich, have you ever had people apply for, say, a hospital policy for one hundred days, when they weren't entitled to a hundred days?

A. No, sir.

Q. Have you ever had them apply for a surgical operation more than the amount called for by the policy?

A. They don't apply for any particular amount. They merely give the facts, and they are paid in accordance with the provisions of the policy, so they make no application for any specific amounts.

Q. Don't they submit hospital bills and ask that they be paid?

A. They submit hospital bills with the claim form, and that's it.

Q. Are those hospital bills ever in excess of the amount that is paid them?

A. The hospital bills in excess? Yes.

Q. Well, then, those people expect more than they get, don't they?

A. No, they merely send in their bills to prove what they [fol. 179] are entitled to. They wouldn't be entitled to the fifteen dollars a day if they didn't have the bill to show for it, even though it was twenty dollars.

Q. Are they required to send in bills for the surgical operations?

A. Surgical operations? I believe that is an indemnifying type of contract, yes.

Q. In other words, if they were—if the doctor charged them only twenty-five dollars or fifty dollars for an operation which, according to the advertising or according to the schedule, they would be entitled to three hundred dollars, you would only pay the twenty-five dollars, is that correct?

A. If they are entitled to the twenty-five, then they would get the twenty-five.

Q. You would only pay them what the actual doctor bill was, is that correct?

A. No, they would be paid what the policy provision provides.

Trial Examiner Hier: What he means, if they happen to pick out some surgeon who wants five hundred dollars for taking out an appendix and he takes it out and submits a bill for five hundred dollars you don't pay five hundred dollars.

The Witness: Of course not.

Trial Examiner Hier: You pay what the policy provides?

The Witness: What the policy provides.

Q. (By Mr. Brookfield) What do you pay when the policy makes no specific provision for an operation?

A. Well, if it is so minor that he doesn't have a specific [fol. 180] amount, there is a minimum amount paid, which is also provided in the policy.

Q. I refer you to this language, Mr. Witness.

Mr. Langs: What are you referring to?

Mr. Brookfield: It——

Trial Examiner Hier: Commission's Exhibit what?

Mr. Brookfield: Commission's Exhibit 11(a), second page.

Trial Examiner Hier: Commission's Exhibit 11(a).

Mr. Brookfield: In the event of cutting operations or treatment of fractures not specified in the schedule of operations which are performed by legally qualified physicians or surgeons, the company will determine the amount to be paid for such operation on a basis commensurate with operations specified here under.

Q. (By Mr. Brookfield) Are you familiar with that?

A. Yes, I am.

Q. Now, what I want to know is how do you determine or how does the company determine what amounts are going to be paid for such operations?

Mr. Langs: Now, just a moment. Number one, Mr. Tolmich is not—in fact, he is not an employee of the company, as such. He is a general agent.

Number two, the document itself specifically specifies how it will be determined, and it is getting back to the same objection that counsel raised in my situation, that the document speaks for itself.

Trial Examiner Hier: Well, I don't know that it does. Mr. Langs, to somebody not familiar with an insurance [fol. 181] document. I wouldn't know what they mean by "commensurate with other operations".

I think he may answer. Take, for instance, this. Last week I had a mole or a wart removed from my left wrist. I suppose it was a surgical operation. There was some cutting done. It was burned. I don't know what he is going to charge me. It doesn't make any difference. What would you pay for that?

The Witness: Well, not being a claim man, I don't know. I have seen such claims come up, and I have always taken the position that the public pays me, not the company, and therefore, I must see that they get everything they are entitled to, and I do. If it is a minimum of five or ten dollars, as is listed in the schedule, that's what they get. There is

something in that schedule that is comparable to that type of an operation; if there is, then I see that that is done. Do I answer that?

Q. (By Mr. Brookfield) What they pay is entirely up to the company, isn't that correct?

A. I have seen the company make a mistake, and I call it to their attention, and they pay it, if they ever make a mistake.

Trial Examiner Hier: That isn't his question. The question is, the amount, was it what, commensurate with other operations in the schedule below attached. Is that what it says?

Mr. Brookfield: On a basis commensurate with other operations specified hereunder.

Trial Examiner Hier: The determination of what is or is not commensurate is solely within the province of the company, is what he means by his question.

[fol. 182] The Witness: Yes.

Trial Examiner Hier: There is nothing the insured can do about it, except to sue in Court on the basis it is not commensurate, I assume?

The Witness: Well, they can come back to me, and I, being the middle man, if I think the claimant is correct, I insist on the right thing being done, and they do it.

Trial Examiner Hier: All right, go on.

Q. (By Mr. Brookfield) Now, Mr. Tolmich, most of these policies that are sold through your office are sold by agents who are working on commission?

A. That's correct.

Q. The more policies they sell, the more money they make?

A. That's right.

Q. The more policies they sell, the more money you make?

A. That's right.

Q. Is it not a fact that every agent has his own pitch which he uses in explaining the policy which he is selling?

A. It is not.

Q. Every one of your agents uses the idential language in each policy, with reference to each policy which he sells?

A. I cannot——.

Mr. Langs: Just a moment, Mr. Tolmich. I don't know what counsel means by this word "pitch".

Trial Examiner Hier: A sales approach.

[fol. 183] Mr. Langs: I don't think that "pitch" in the usual connotation comes within the complaint in this case. The complaint is based upon certain specified advertising which this company puts out, and what an agent's pitch may be, define it as you want to define it, is certainly not within the purview of this Complaint.

Mr. Brookfield: Mr. Examiner, this witness testified on direct that every policy that was sold was explained at great length and the advertising material which was supplied to them was explained to the "witness" at great length, and I certainly have the right to ask that question in view of the statement of this witness.

Trial Examiner Hier: I think so, Mr. Langs, and I overrule the objection.

Mr. Langs: May I make this statement in the record. This witness did not indicate that there was an explanation of the advertising. He did state there was an explanation of the policy, and he went into details as to how that was handled.

The questions that were asked about the advertising were whether or not this witness had had any complaints from a customer about the advertising misleading them in the purchasing of a policy, and there is nothing in this record about explaining the advertising. You don't explain the advertising. The advertising is simply the means of finding the persons who are interested in saving their time and other things which this witness has testified to, but the statement which counsel has made is that there is an explanation in the advertising is not correct.

Trial Examiner Hier: He used the word "discuss"—"in [fol. 184] discusing the matter with a prospect"—that is pretty broad. You may answer. Do they all have the same sales approach, oral sales approach?

The Witness: Yes, I set up the sales presentation, and it is followed, as far as I know, to the letter. Not only that. Every man is taught to do his job so that over a long range it will be to his benefit to do it that way. They are not selling these policies just to get the money right away. That isn't good business over a long-range plan of operation.

Q. (By Mr. Brookfield) You mean by that, then, all of your employees engaged in only altruistic activities rather than trying to make money?

A. No, sir. They are intelligent selfish—intelligently selfish—by being truthful, and they find that it is a much better business in the long run.

Q. How many agents do you have?

A. Ten that I house, and one hundred-some that I license.

Q. And each of those one-hundred-and-some use the same sales approach that you prepare for them?

A. No. Those that are housed. The others are doing business through their own company, and they merely place business through my office when they cannot place it with their company.

Q. They are not selling National insurance?

A. Yes, they are, but not as the number one company.

Q. Do they use the advertisement which is put out by National?

A. Not for the purpose of circularization, no. They usually have their own prospects.

[fol.185] Do they use any of the advertising put out by National?

A. They use the application form, yes. They all have policies, samples.

Trial Examiner Hier: Do you distribute this descriptive literature which the respondent furnished to you to these one hundred-some-odd sub or affiliated agents?

The Witness: Yes.

Trial Examiner Hier: They have it?

The Witness: They have it, but not in bulk such as our men do.

Q. (By Mr. Brookfield) Now, Mr. Witness, referring now to the application, will you refer to Commission's Exhibit 12 (b). Are they furnished by you with literature similar to this?

A. Yes, sir.

Q. And do they use that literature in selling National policies?

A. Of course. They—it is necessary for me to explain this. These people have friends, and they use that for getting the rate on one side, and the information on the application on the other. They may refer to the other part,

the advertising features, but I would say that in most instances when they request that they already have the interest from the prospect. Therefore, it is not necesary to set up the features as we do when we do not have a prospect.

Q. But, as a matter of fact, is it not a fact that you don't know how these independent agents use this literature? You only know how your men use it?

[fol. 186] A. That is correct.

Q. Now, any claims that arise from sales by these independent agents, are they also handled through your office, or are they handled directly by or through the company?

A. They are handled through my office. Sometimes the agent will call my office, and then they are passed on to the claim department.

Q. Now, in securing prospects do you buy lists, prospects to whom to mail?

A. We have done that, yes.

Q. How else do you secure their names, the names of prospects that you mail literature to?

A. Get them out of the telephone book or criss-cross and such, and buy names as well.

Q. Then actually when you mail out the various pieces of literature which have been shown you by Mr. Langs, to prospects, you don't know what income bracket they are in, is that correct?

A. No, I do not.

Q. You don't know what they do?

A. That's correct.

Q. In other words, they are mailed out to members of the public?

A. That's right.

Q. And if one of these members of the public mails in a return card, such as was shown you, then you send an agent to see him?

A. That's right. That's right. But anybody that can't read, of course, doesn't send it in.

[fol. 187] Q. Mr. Witness, have you made any checks or do you know what percentage of sales are made from this advertising, from each mailing?

A. Percentage of sales?

Q. Of policies?

A. There has been as high as two per cent returned, and one per cent sold—or thereabouts.

Q. In other words, on that basis you would get about two returns out of each hundred you mailed out?

A. That is about right.

Q. And then would probably sell one of those two?

A. That's correct.

Q. Do you use any mailings for the other companies which you represent?

A. No, I do not.

Q. You said that eighty per cent of your business was life insurance, and twenty per cent was accident and health.

A. Accident and health, that's right.

Q. You don't use any mailings for the life?

A. Yes, I do.

Trial Examiner Hier: This eighty per cent, is that on the business written? Is that on premiums collected or the face of the policy, or what is it figured on?

The Witness: We figure it on commissions earned.

Trial Examiner Hier: Commissions earned?

The Witness: Yes.

[fol. 188] Q. (By Mr. Brookfield) Mr. Tolmich, you don't personally contact each applicant that files a claim, do you?

A. Of course not.

Q. So you don't know what the basis of the claim is? You pass it on to the company, is that correct?

A. That's correct. That is true in most instances. If there is any question it is usually brought to my attention because my name is the one that is really known among these people.

Q. Now, you stated that some companies require a medical examination for accident and health policies, is that correct?

A. That's right.

Q. Now, what companies?

A. What companies?

Q. Yes.

A. My life insurance company, the Continental Insurance Company, is one of them: and then there is a dozen others that I can't think of offhand that I know require examinations on some of their non-cancellable accident and health policies.

Q. The policies sold by National are not non-cancellable policies, are they?

A. That's correct.

Q. They can be cancelled by the company at the expiration of any policy year?

A. That's correct. Of course, the price is relatively less because of that.

[fol. 189] Trial Examiner Hier: Are there any accident and health companies that require medical examinations?

The Witness: No cancellable policies, no, that I know of.

Q. (By Mr. Brookfield) Then in that respect the National doesn't offer anymore than any other company, does it, in that respect?

A. In that respect they do not offer any more, except that it indicates that it is a cancellable policy; it differentiates between a cancellable and a non-cancellable, because of the examination.

Q. Well, aren't there any number of other competitive life insurance companies that sell the same policy without the so-called medical examination?

A. Yes.

Q. How about your Continental?

A. Continental Casualty? Yes, they write only cancellable insurance.

Q. The same as——

A. National.

Q. The same as National?

A. That's right. There are lots of companies that do. There are lots of companies that write only the other kind.

Q. Now, Mr. Tolmich, in testifying here today you have been testifying as an experienced insurance man of some thirty years.

A. That's correct.

Q. You don't know what the various terms, as set out in these policies and as set out in the advertising, too, means to the man in the street, do you?

[fol. 190] A. Nobody knows. All I have to go by is my experience, the reaction from the public.

Q. Is it not your reaction from the public that the public itself knows very little about insurance except the words "benefits" and "payments" and "costs"?

A. Would you mind repeating that exactly?

Mr. Brookfield: Mr. Reporter, will you read that back? I will repeat the question.

Trial Examiner Hier: Let him read the question.

(The reporter read the question as follows:

"Question: Is it not your reaction from the public that the public itself knows very little about insurance except the words 'benefits' and 'payments' and 'costs'?")

The Witness: In my experience I would say that the public is interested in the highlights of the benefits and the costs, which is all that this literature is intended to do, is get interest. It is not a representation of all the benefits nor all the exceptions.

Q. (By Mr. Brookfield) This advertising stresses the benefits a great deal more than it does the exceptions, don't it?

A. It doesn't stress all of the benefits either. It is only the exceptional benefits or the type of benefits that might get interest to a point where they will want to know more.

Q. Mr. Tolmich, did I understand you to say that you sell non-cancellable accident and health

[fol. 191] A. I do.

Q. For Continental?

A. Insurance.

Q. By itself, without selling any other policies?

A. That's correct.

Q. It doesn't have to be bought or purchased in connection with any other policy?

A. That's right.

Q. That is the type of policy that National does not sell?

A. That is correct.

Q. Now, Mr. Tolmich, in connection with the claims which you have handled, to your knowledge has the company turned down any claims because of pre-existing illnesses?

A. I believe they have, and in most instances they were out-and-out frauds.

Q. They wouldn't be people who misunderstood the policies they were buying?

A. They wouldn't——

Q. They weren't people who misunderstood the terms of the policy they were purchasing?

A. People do not misunderstand when they have ulterior motives, and quite often we find people hiding the facts from us.

Q. Are you intending to convey the idea that every person with a pre-existing illness who attempted to collect on an insurance policy from National through your office was doing so with fraudulent intent?

[fol. 192] A. Quite often people do things without intent that are not honest. Some of these people just either forget to tell you that they have just had an operation, and the doctor didn't tell them that it was cancer, and we don't know about it, and three months later they make a claim.

Q. Have you had people file for—strike that.

Q. (By Mr. King) Mr. Tolmich, referring to these people who, as you put it, non-intentionally filed claims as, for example, treatment, reimbursement for treatment for cancer or hospitalization, have any of those persons ever given you a reason why they filed the claim?

A. No, they don't explain those things.

Q. Haven't they told you, as a fact, Mr. Tolmich, they told you they believed they were covered for hospitalization?

A. No, they did not. They knew that they can't buy, for illustration, fire insurance on a house that was burned last month.

Q. If they knew it why did they file the claim?

A. Well, it would take me too long to really tell you all of the facts, but I can assure you that it is mighty nice to say that only a few of them do that, but there are some of them that will make claims that are ridiculous, and will insist on it, and I have had this come up time and time again, and later admit that they were wrong.

Q. Mr. Tolmich, have you ever had an occurrence in your office where a person has filed a claim for a disease such as cancer, of which they had no knowledge at the time they took out the policy?

A. Have I had—I merely use that as an illustration, but lots of people have had different types of sickness.

[fol. 193] Have you ever had a person file a claim for

any type of sickness pre-existing the effective policy date, which, to your knowledge, that person did not know about it at the time he filed application for the policy?

A. I wouldn't know that.

Q. Have you ever had any correspondence on such a claim or question?

A. Where the claimant had no knowledge of it?

Q. That is correct, sir.

A. No.

Q. You have never received a letter of inquiry from any person in regard to a pre-existing claim? I mean a pre-existing cause of illness prior to the effective policy date, which that person requested reimbursement for hospitalization claim, in which the company refused, because it was a pre-existing cause?

A. Yes, I have had lots of situations of that sort in the past seventeen years, where there was a pre-existing claim that wasn't paid.

Q. It was not paid. Well, then, under those circumstances can you tell me why such persons file those claims?

A. Yes.

Q. Tell us.

A. I will recall one at this time who made a claim and our company said it was pre-existing. He came back to me and he insisted it wasn't so. I went up with him to the claim department. They said, "All right, we will check again". We checked again. This was three times that I went back to the Home Office. This man insisted that it [fol. 194] was not pre-existing. The fourth time, when it was denied, he admitted to me that it was pre-existing. I have many such similar cases.

Q. Now, have you ever had a person in such a situation say to you or write to you that it was his information and belief when he applied for and received the policy that he was covered for sickness, period, and that he had no knowledge of the conditions of the policy that pre-existing causes were not covered in the policy?

A. I don't recall any such claim.

Q. You don't recall any correspondence of such a nature?

A. No, I do not.

Q. You don't recall any inquiry for—any inquiry from any of the thousands of persons to whom you have sold policies?

A. That they thought they were covered on a pre-existing condition, no, sir.

Q. You maintain correspondence files on persons who have policies which have been purchased through your office, who write to you?

A. I do have some.

Q. Where do you store those files?

A. In my office.

Q. Where is your office located?

A. On James Couzens.

Q. At what address?

A. 18604.

Q. Now, Mr. Tolmich, will you tell me in comparison, the number of National Casualty accident, health and hos- [fol. 195] pitalization policies you sell? What is the comparative figure between that and the A and H non-cancellable policies you sell for the Continental Insurance Company?

A. Oh, I have very little with Continental Insurance. It is only a matter of two or three years that I have been writing—that Continental has been writing it.

Q. Can you give me an estimate for the year 1955, sir?

A. Oh, fifteen or twenty.

Q. And what would be your estimate of the number of National Casualty policies you have written?

A. Oh, hundreds.

Q. Hundreds?

A. Yes.

Q. And you would say, sir, would you not, that based on that figure and your experience in the selling of A and H insurance that a very minute portion or a very small percentage of policies sold are non-cancellable A and H policies?

A. That is correct.

Q. Now, isn't it true that the non-cancellable policies have higher rates?

A. That is correct?

Q. Could you give us an estimate as to the differentiation?

A. Probably double the other.

Q. Probably double. Mr. Tolmich, I show you Commission Exhibit 13 (b), and ask you whether you are familiar with that circular?

A. Yes, I am.

[fol. 196] Q. And you use this in sales policies?

A. Similar.

Q. Now, looking it over, sir, you will note on the back it states, "No medical examination required." Is that correct?

A. Right.

Q. Now, I ask you, in looking over this, you see any place on there where it states that the National—strike that. Can you tell me what policy this exhibit applies to?

A. Well, apparently it is a medical-care policy.

Q. What policy is that?

A. Home and hospital and medical expense policy.

Q. Now, I ask you, sir, is that policy cancellable or non-cancellable?

A. It is cancellable.

Q. Under what condition?

A. Well, I don't know the exact provision; whether it means that they can refuse to renew it or whether it expires on age sixty-nine, or whatever the age is. I don't have it exactly.

Q. I now show you Commission Exhibit 13 (a), and ask you what it states on the front thereof?

A. "This policy is cancellable."

Q. "This policy is cancellable." Now, isn't it a fact that any of the National Casualty Company's policies may be cancelled by the company at the end of any premium term?

A. That is correct.

Q. Now, sir, do you consider that an important feature [fol. 197] of the policy? An important exclusion?

A. Yes, I do.

Q. Now, sir, I show you again Commission Exhibit 13, and I ask you if you see anyv here on that circular any statement to which it refers, the home and hospital medical expense policy is cancellable by the company?

A. It doesn't say so.

Q. Now, you tell me, sir, that the reason that "no medical examination required" is put on that circular is to contrast is between cancellable and non-cancellable policies. Now, why is it when this ad refers to a cancellable policy, and great pains are taken to show it is not a non-cancellable policy by an indirect method, by saying "no medical examination required" at the end, it does not say "renewable or cancellable at the option of the Company only?"

Mr. Langs: Now just a minute. Counsel is putting in here a comment by indirection or implication. Counsel can put any argument he wants in, but his cross examination can only be upon those items which are facts in this case, and he can't use something as a conclusion, which is the function of the Court in the cross examination. There is no such thing in this, and I very strenuously object to the use of this language in the question.

Trial Examiner Hier: I am not going to be misled by the way it was drawn. We will draw our own inferences. Answer the question.

The Witness: I don't remember exactly what your question is, but let me talk.

[fol. 198] Mr. King: All right.

Trial Examiner Hier: You want it read back?

The Witness: No, no. The purpose of that literature is to gain interest, and not to represent its coverages, which is being done when the policy is explained. This is merely to gain interest, eliminate people who are not interested or who do not come in the category of that type of a policy, and so what is put in or what is left out is not material because it is not used for explaining the policy. It is used for getting interest only, and we do not put in there all of the coverages, either, because there are only the features.

Trial Examiner Hier: The interest you seek to stimulate, Mr. Tolmich, is the interest in being covered against accident and ill health?

The Witness: That's right.

Trial Examiner Hier: When you say it is not put in there to describe the coverages I don't follow you. It is put in there to stimulate interest in coverage.

The Witness: That's right.

Trial Examiner Hier: And the breadth thereof. I don't understand the distinction which you make. Now, if you are making this point, it is used to stimulate interest in coverage, and then subsequently when the agent explains it to the man, he corrects any misapprehension this may have created, that's one thing, but I don't follow the other statement.

The Witness: That's what I mean. I don't know about any misapprehension.

[fol. 199] Trial Examiner Hier: I am not assuming—or I am just assuming there is.

The Witness: What it says there is true. It needs supplementing with the fact that there are other features that are not played up, and we finish that up with, for instance, we don't mention all of the coverages. We finish that up. We don't mention all of the exceptions. We finish that up.

Trial Examiner Hier: Go on. Tell me this before he starts on you again. Based on your experience, supposing you put everything in this ad—I don't mean everything that is in the policy—but suppose you put in exclusions and the fact it is cancellable and this, that and the other thing, and medical examinations are required under certain circumstances. Would business increase considerably or not?

The Witness: Most of the people wouldn't read it because it is too much. That's the main reason for eliminating the mechanics. Most people probably wouldn't understand if you went into the technicalities.

Trial Examiner Hier: Go on.

Q. (By Mr. King) I again show you Commission's Exhibit 13 (b), and ask you if you see on that advertisement any exclusions?

A. As I mentioned, it doesn't have all of the features, bad and good.

Q. Does it have any of the bad features?

A. Well, there is only one bad feature that is required in all policies; the things that we do not pay for; and that is true in an expensive non-cancellable policy, and I don't believe even that policy has the exclusions.

Q. Looking at the advertisement, sir, could you tell me [fol. 200] any of the benefits which are not mentioned in the ad?

A. Yes, I think so.

Q. Would you tell me one, sir?

A. Well, we have double indemnity features for certain sicknesses or accidents. We cover, in traveling in other countries—I don't know. There are lots of things, if I took the policy, that I could point out to you.

Q. Now, isn't it a fact, sir, that this statement, "No medical examination required", conveys no distinction between a cancellable and a non-cancellable policy?

A. Well, I don't know what conclusion you draw from it, but in our business it is automatically understood that medical is required in cancellable and non-cancellable, or the other way.

Q. You think there is any confusion in the minds of the public on that point?

A. Well, I can only answer it from my experience.

Q. Yes, sir.

A. And I honestly, truthfully, tell you that I have yet to have anyone come to me and complain about any of this advertising.

Q. That wasn't the question. The question is whether, in your experience, you believe the public is confused on the point of the requirements of medical examinations.

Mr. Langs: I think the witness has answered it.

Trial Examiner Hier: He may answer.

The Witness: Yes, I can answer. No.

Mr. King: Thank you.

[fol. 201] Trial Examiner Hier: Obviously that is what he would say, or he would do something about it.

The Witness: I can only say what I know or think.

Q. (By Mr. King) Now, Mr. Witness, earlier you testified that certain specimen policies are distributed by the hundreds to prospective insureds at the time of sales.

A. I never said that.

Q. What did you say in that regard?

A. I said that eac agent has a specimen policy.

Q. Which he carries with him?

A. That is correct.

Q. Which he shows to the prospective insured?

A. That's right.

Q. What is the size of that policy? Is it the standard size?

A. No. We usually have a small specimen policy, as a rule. In some cases we don't have specimen policies that are cut down, so we use the big one, the regular one.

Q. Can you tell me what National Casualty supplies to you? Are they the smaller or the same size as the regular policy?

A. I really don't remember what kind we have. I have seen both.

Q. You have seen both?

A. Yes.

Q. You don't know what size or kind your agents are carrying now, do you?

A. Usually the small.

[fol. 202] How much smaller than the regular size policy that is actually issued?

A. I wouldn't know.

Q. Would you say it is fifty per cent smaller?

A. Approximately.

Q. Approximately fifty per cent. Now, Mr. Witness, you testified with reference to certain ads the latter part of this morning's testimony, that you were familiar with them, and the statements contained therein have been used by National Casualty Company in its advertising over a period of years, is that correct?

A. That's correct.

Q. I noted in the beginning portion of your testimony there was no direct statement made as to such with regard to the first ad you testified on, and in that connection I show you a copy of the complaint from which the quotations read to you were taken, and I ask you, in Sub paragraph 1 of paragraph 3 of the quotation, "For individuals or family groups, ages 1 day to sixty-nine years". Has that been used for a number of years by the company?

A. I don't recall just when we changed from one to sixty-nine. I think it used to be sixty-five, if I am not mistaken.

Q. But either one or the other has been used for a number of years?

A. Yes.

Q. Now, the statement, "No medical examination required". Has that or similar language been used?

[fol. 203] I believe so.

Q. For a number of years?

A. That is correct.

Q. Now, the statement, "Monthly benefits up to three hundred dollars per month paid from first day of any sickness or accident", has that been used?

A. Yes.

Q. I see, sir. Now, I ask you how you construe, based on your knowledge of the company's policies, the word "any" in that quotation.

A. My personal opinion is not important, except my experiences with the public.

Q. I am asking you for your opinion. How you construe that word "any".

A. As a salesman?

Q. No, sir; as a man who is a general agent for National Casualty Company, and as an expert.

A. I am not an expert on languages.

Trial Examiner Hier: What does that mean to you?

The Witness: I will be glad to tell you my reaction.

Q. (By Mr. King) All right, go right ahead.

A. "Monthly benefits up to three hundred dollars a month paid from the first day of any sickness or accident." Oh, yes, sure. We are referring to a specific policy in accordance with the exclusions and provisions, and that's what "any sickness or accident" refers to.

Q. In other words, you say "any sickness or accident" [fol. 204] refers to any sickness or accident covered by the policy?

A. When we are talking about a specific policy then we are talking about the coverage as provided by the policy.

Q. Now, I take you down to the next quotation. "Hospital room and board for one hundred days for each sickness or accident."

Now, I ask you, sir, how you would construe the word "each".

A. If I would—If I were talking about the policy, I would say "each sickness covered by the policy".

Q. Now, I take you down to the next quotation, which says, "Fifteen dollars per day for hospital room and board for one hundred days, each disability," and I ask you if you construe "each" in that sentence in the same manner?

A. Yes, I do.

Q. All right, I take you to the next quotation. "Surgical Operations, whether performed in or out of the hospital, are paid up to three hundred dollars in addition to hospital benefits," and I ask you, in your construction of the words "up to three hundred dollars", whether that means to you that they will pay the bill for any surgical operation up to three hundred dollars or whether they will pay the bill for surgical operations up to three hundred dollars in accordance with the schedule given in the policy?

A. The latter.

Q. That latter. Now, going down to sub paragraph 5, paragraph 3, I show you a quotation that reads, "Monthly income up to three hundred dollars for total disability from sickness paid from first day for two years". Now, [fol. 205] what is your interpretation of this word that is capitalized and underlined, to wit, "First Day"? What does that mean?

A. I am speaking of a policy, I become all-conscious of the provisions, and it means just that.

Q. In other words, it would not necessarily mean then, to you, the first day, say, I would take out that policy today and I was to have a hernia operation that disabled me for life tomorrow—that would not necessarily mean that to you, would it?

A. If you would buy a policy from me you would hear such a statement as this; "this covers from the first day of accident and the thirty-first day of sickness, in accordance with the provisions of the policy". That's what you would hear.

Q. I see. Now, I ask you, sir, again to look at that sentence, and you don't see the words you have just stated there, do you? You just see "From first day for two years with no confinement required at any time". Is that what you see?

A. Wait a minute. Where?

Q. Here.

A. That's correct.

Q. Did I quote the sentence correctly?

A. Yes.

Q. Thank you.

Mr. King: No further questions.

Redirect examination.

By Mr. Langs:

[fol. 206] Q. Mr. Tolmich, just a couple of questions. Both counsel have asked you on cross examination concerning your opinion on the public's reaction to these items of advertising which have been distributed.

Now, for the purpose of—so that I understand it and the record is clear on it—I think you made the observation that all you know is your experience, and by "experience" you mean what?

A. Dealing with the public who buy these policies.

Q. What complaints the public raise to you?

A. That's right.

Q. What they say about it to you?

A. That's right.

Q. So that it comes back to this situation, and is this a fair statement: That when you answered my questions on direct examination as to whether or not any person to whom you sold a policy had complained to you that they were misled by this advertising material, and you said that you had never received any such complaint—that is an experience and a reaction which you received from the public, is that correct?

A. That's correct. I believe I did not fully explain, when you asked me whether that first impression of the advertisement was the one that was lasting. As a matter of fact, after thinking about it, at no time was there any reference made to the advertisement after the policy is sold, because nobody remembers the original interest-getting piece of literature. They remember what is told them in the policy.

Q. What the salesman tells them about the things that it covers and the things that are excluded?

[fol. 207] A. That's right.

Q. Now, you also mentioned, with reference to Exhibit 12 (b), that this piece of material—application—what the agents who are not housed by you—receive when they want to sell insurance which National carries, and some other company doesn't carry.

A. Right.

Q. And I show you this Exhibit 12 (b), and refer you to the—first of all, how many pages does it contain?

A. Four.

Q. And on pages three and four you find what?

A. The application and the rate sheet.

Q. And the application and rate sheet is the thing which the people are primarily interested in? The agent, I mean?

A. That is part of the contract.

Q. The agent, that is what he wants in order to have this policy issued?

A. That's right.

Q. He wants the application form, and he wants to know what the rates are that he must quote.

A. Yes.

Q. And that is on pages three and four?

A. That is correct.

Q. Now, there were several questions asked, Mr. Tolmich, by both counsel, concerning the advertising literature, as to whether or not it contained all of the points—strike that. All of the points covered by the policy, and all of the points [fol. 208] excluded, and you indicated that all of the points excluded were not covered, and all of the points included were not covered?

A. That is correct.

Q. That it was only the highlight features. Now, isn't it true, Mr. Tolmich, that many of these points have not been covered in the advertising literature for the simple reason that the points which have been highlighted represent the differences or the things which makes this policy of National different than some other company? The difference?

Mr. Brookfield: I object to that question.

Trial Examiner Hier: What?

Mr. Brookfield: I object to that question.

Trial Examiner Hier: It is leading. Sustained.

Mr. Langs: Let me rephrase the question a little bit.

Q. (By Mr. Langs) Is it true the statements contained in the advertising material, which questions were asked of you on cross examination, represent highlights in the policy issued by National Casualty?

A. That's true.

Mr. Brookfield: Same objection. It is just as much leading.

Trial Examiner Hier: Sustained. It is still leading. The question is what does it represent.

The Witness: What does the circular represent?

Trial Examiner Hier: What do these points that are stressed—what do they represent?

[fol. 209] The Witness: As far as I know, in most instances they are things that other companies may or may not have.

Trial Examiner Hier: That leaves me in the dark—may or may not.

The Witness: There are some companies who have some of these, and others—they don't all have everything necessarily that we have. I am really not an actuary, to know what all of the other companies have.

Q. (By Mr. Langs) Mr. Tolmich, when you say that they may have, I believe you explained on direct examination that as to benefits some companies may have more than others?

A. That's right.

Q. One will advertise fifteen dollars a day, one will advertise ten, and one will advertise twenty dollars a day?

A. That's right.

Q. Those are differences as to amounts. They are still benefits, but differences as to amounts, is that correct?

A. That is correct.

Q. So that when National sets forth in literature certain statements about benefits, that is done for the purpose of what?

A. To show what National offers as compared to what others offer.

Q. When——

Trial Examiner Hier: I don't get the last part of that, "as compared to what others offer." All it shows is what National offers, isn't it? You would have to go on and look at the other companies' ads to see what they offer?

[fol. 210] The Witness: Yes, there are so many of them that send out circulars that we feel what we have in ours may attract an interest in them enough to return the card.

Trial Examiner Hier: There is no basis for comparison in the ads themselves?

The Witness: No.

Trial Examiner Hier? You stress what you offer?

The Witness: That's right.

Q. (By Mr. Langs) However, you just indicated, Mr. Tolmich, as I recall now—I want to get this correct—that other companies send out literature, too?

A. That's correct.

Q. So that if one man gets literature from two or three companies, one of which is National Casualty, he has an opportunity to see which one he thinks he would like to call?

A. That's right.

Q. So to that extent there is a comparison?

A. That's correct.

Mr. Brookfield: Mr. Examiner, I move that question and answer both be stricken. That is purely a supposition.

Trial Examiner Hier: I can make it without the answer. I think anybody could make that. If I have got a lot of stuff before me I can compare. There is nothing new about that. I will leave it in. The opposite point is true, too. If I don't [fol. 211] have it, I can't compare it without going and getting it.

Q. (By Mr. Langs) Do you know, Mr. Tolmich of any company that writes cancellable insurance. A and H insurance, that covers pre-existing illness? That includes or pays claims on pre-existing illness?

A. No, I do not.

Trial Examiner Hier: Was that cancellable or not cancellable?

Mr. Langs: Cancellable.

Q. (By Mr. Langs) Would there be any point in including highlights in advertising, points which are the same so far as all companies are concerned, so far as benefits and claims are concerned?

A. Then it becomes repetition, and it doesn't serve our purpose of getting interest.

Trial Examiner Hier: Nor does it serve the purpose of getting the business in your company?

The Witness: That's right.

Trial Examiner Hier: There isn't any sense in advertising the other fellow's business?

The Witness: Of course.

Q. (By Mr. Langs) Mr. Tolmich, isn't it true, as a salesman, you attempt to sell those points which you feel are better or different than your competitors? You are not selling the same product as your competitors, isn't that true? You highlight your better points?

A. Only to get interest.

Q. That's what I mean.

[fol. 212] A. As far as selling is concerned, we sell primarily the need for the coverage, and then offer a solution through the coverage, but to highlight, we merely do it to get interest, and in that way we can have prospects.

Q. Now, on one other item. On this question of specimen policies, you were a little bit in doubt on that as to the exact size of those policies, whether they were large or small, so far as National is concerned.

A. Yes.

Q. If I would indicate to you that as a matter of fact, although National has both large and small policies, so far as the specimen is concerned, that they do not provide specimen policies except in the same size as the original.

A. That is possible.

Q. Would you say I was wrong on that?

A. No.

Mr. Brookfield: Object to that question. That is another leading question.

Trial Examiner Hier: Sustained.

Mr. Langs: Your Honor, it is simply clarification of something which he was in doubt about at the time.

The Witness: I probably made the statement when I was thinking of Continental having specimen policies.

Trial Examiner Hier: What is the fact?

The Witness: Obviously National doesn't have smaller size policies, specimen policies.

Mr. Langs: The specimen policies which we will bring [fol. 213] out through other witness, officers of the company, are exactly the *the* same size policies.

Trial Examiner Hier: They are? Apparently the witness wasn't sure about it.

Mr. Langs: He indicated he was not sure as to the situation, and I was simply bringing out a clarification of the point. No further examination.

Trial Examiner Hier: Anything more from you?

Recross-examination.

By Mr. Brookfield:

Q. Mr. Witness, you were shown Commission's Exhibit 12 (b), which was an application for one of the policies of National that you distribute to your dealers or your sub agents.

A. Yes.

Q. You also distribute plain applications that don't have any literature on them at all?

A. To the brokers who are not familiar with the coverage I usually send one of those for their information, and then if they need more we send them plain applications.

Q. And that is true of all National policies which you sell that way?

A. Yes.

Q. Mr. Witness, is it not a fact that the purpose of mailing all of this literature is to arouse the recipient, a member [fol. 214] of the public's interest in purchasing insurance from your company, rather than engaging in a popularity contest with some other company?

A. The purpose is for them to return our return card.

Q. So that you can contact them

A. And tell them the facts about the policy.

Q. And sell them a policy?

A. Of course.

[fol. 215] Peter G. Korn resumed the stand and testified further as follows:

Direct examination (continued)

By Mr. Langs:

Q. Now, if we can find where we were, Mr. Korn——

Trial Examiner Hier: I think you had finished this medical examination.

Mr. Langs: No, we hadn't finished with that.

Trial Examiner Hier: I don't know where you left off.

Q. (By Mr. Langs) I think we covered, Mr. Korn, this "peace of mind and security for life"? Didn't we cover that? I will show you Commission's Exhibit 6(i). Do you recall that as the last one we talked about?

A. That was the last exhibit we spoke about.

Q. This contains a statement, "I understand this peace of mind and security will be mine from the first day, even for life." In your experience, personally, have you received any complaint from any insureds that they were misled in purchasing a policy from National by virtue of that language?

A. No, sir.

Q. And did any information reach you as administrator of National Casualty Company through the several departments that any complaint had ever come to them from any insured that he or she felt they were misled in purchasing the policy from National by virtue of this language?

A. No, sir.

[fol. 216] Q. This language has been used in the A and H business of National for how many years?

A. I cannot say exactly how many years, but in respect to the specific policy to which it applied, my best judgment, possibly the last five or six or seven years that we wrote that type of coverage.

Q. It is a matter of several years that this has been used?

A. That is correct.

Q. Now, the next one that has been set forth in the complaint by the Federal Trade Commission is a statement, "No medical examination required." Now, will you, out of your experience and knowledge, will you give to us a little historic evolution as to the use of this term "No medical examination required", as it applies to A and H business?

A. It has been more or less common knowledge that medical examinations were required in connection with life insurance. Accident and health insurance is much younger than life insurance. Years ago—some twenty or twenty-five years ago—it was difficult to sell accident and health insurance. People weren't conscious of its need. They used various excuses when they hesitated buying it because of the

fact they feared it might require a medical examination. That was one reason why the companies adopted the phraseology in their advertising to simplify the sale by "no medical examination required", the agent takes the physical history, whereas in life insurance the examining doctor usually took that information. To some degree—I don't know how much—there has been in the insurance industry some differentiation between non-cancellable insurance or non-terminable insurance accepted at the end, to which [fol. 217] the premium was paid. There has been that distinction. I think it has been merely primarily, let us say, to convey to the people that you could get this insurance without going through a lot of red tape.

Q. How many years has this statement, "No medical examination required", been used by the A and H business?

A. I would say all of twenty years, or more.

Q. And to your knowledge how many years has National used this statement in their literature?

A. Since I have been with the National, and that is fourteen years.

Q. Were they using it at the time you came?

A. Yes, I believe so.

Q. Now, ——

Trial Examiner Hier: Mr. Korn, don't you think, as an insurance man, though, it is a rather unfair burden on a prospective insuree, insured, to disclose to you latent conditions of which he, as a layman, may not be aware? In other words, as to personal terms, I would hate like the dickens to pay premiums a number of years when I had stated in an application that I didn't have cancer, and had it. Even physicians can't discover cancer sometimes, and it seems to me the average layman doesn't know whether he has it or hasn't got it, and when you take no physical examination you put the burden, it seems to me, on the fellow who is least qualified to know what he has got and what he hasn't got.

The Witness: That may be, shall we say, a premise that you think, but bear in mind that in an examination, even [fol. 218] for life insurance, it would not disclose cancer necessarily, and many other conditions that existed, which

would require an X-ray examination, chest examination of various natures.

Trial Examiner Hier: There the company is bound, isn't it?

The Witness: Not necessarily, if there is a misrepresentation. You are inferring a man may not tell because he is too modest. Women are too modest to tell about female troubles.

Trial Examiner Hier: That's another problem.

The Witness: I can go as far as you want.

Trial Examiner Hier: You can't represent what you don't know.

The Witness: That's true, but we say, "To the best of your knowledge".

Trial Examiner Hier: Is that what the application says—"To the best of your knowledge"?

The Witness: That is what we are using, but it is not a burden on the man to produce evidence of his insurability.

Trial Examiner Hier: The burden is on the man to submit what he knows, not what he suspects, or anything of that sort.

The Witness: That is right.

Trial Examiner Hier: I just wanted to get your reaction.

Q. (By Mr. Langs) Mr. Korn, I show you an application entitled Commission's Exhibit 12(b), and ask you to read [fol. 219] the answer to the question about what the application states, as to pre-existing conditions or knowledge of any illness.

A. There are several question, but the pertinent ones—"To the best of your knowledge or information are you and the members above listed now in good health and free from physical impairment or deformity?" And the next question, "To the best of your knowledge or information have you or any members above listed had"—and listing various things. We can't expect anyone to tell us what they don't know.

Trial Examiner Hier: 'You or any members of your family" to raise the suspicion of the medical examiners of your company?

The Witness: No, this happens to be a policy where they are insuring other members of the family, and the application encompasses the health of the entire family.

Trial Examiner Hier: Off the record a minute.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

Q. (By Mr. Langs) Mr. Korn,——

Mr. Langs: Just a minute. Mr. Hier, you heard Mr. Korn read the specific questions. Does that take care of your specific question?

Trial Examiner Hier: Yes, that's what I asked him.

Q. (By Mr. Langs) Mr. Korn, the Examiner mentioned a moment ago about putting the burden upon the insured. Actually, from the standpoint of the allowance or disallowance of the claim—and I think this is already in the record, has been testified to. I don't know as Mr. Korn testified [fol. 220] to it, but the claim man did on the cross examination on the Government's case—that the burden was on the company to establish that such an illness or pre-existing condition actually existed at that time, or was outside of the incontestable feature of the policy with reference to illness. Am I correct in my recollection of that?

A. I don't quite get the point you are trying to convey. You speak of the burden of proof?,

Q. If a claim comes in—a policy is issued, and thereafter a claim comes in, where it appears that the man may have had a pre-existing illness——

A. Yes.

Q. —and he did not have actual knowledge, we will say—it is one of the cases where he just didn't know, but actually a pre-existing illness may have existed. As I recall the direct testimony of the testimony of the Government's case, which was put in by a claim man for National, if the company could not establish the pre-existing illness definitely the claim was paid. If it was a valid situation, that was something else. Is my recollection correct on the testimony?

Trial Examiner Hier: I don't know; I don't remember, it has been so long.

The Witness: It has been the practice of our company that, I believe, not knowing entirely, but it is the practice of all companies, it would be very difficult to defend any rejection of a claim unless you had substantial evidence showing that it was beyond the scope of the policy provision, it wasn't covered because of a pre-existing situation. That [fol. 221] leaves Mr. Hier's remark, regarding the application, we say "To the best of your knowledge", and if the insured made a correct statement, no evidence he didn't make a correct statement, I don't think the company—or at least to my knowledge the company would not reject the claim on that.

Q. (By Mr. Langs) That was my understanding of the testimony, the testimony put in before, that the company did not reject claims because of that. Now, on this statement of "no medical examination required", has any insured or person who has purchased a National Casualty policy, come to you and indicated that in purchasing the National Casualty policy they were misled by this statement, "No medical examination required"?

A. Not to my knowledge.

Q. Have they ever come to you—has it ever come to you through the channels of the different departments of the company that an insured who has purchased a policy from National has complained to the company that they were misled in buying the policy by virtue of the statement?

A. Not to my knowledge.

Q. In your experience have you had any—at any time in the thirty-three years, or thirty-one years, that you have been in the business—has anyone come to you and stated that they were misled by virtue of this statement having been used in the circular, in the purchase of A and H policies?

A. Still referring to that statement "No medical——"?

Q. The same statement. That's right.

A. No.

[fol. 222] Now, this statement, "No medical examination required", so far as a person who comes in and wants to buy insurance, and he qualifies as to age and so forth, is that a true statement? You either do or do not require

a medical examination for the purpose of the issuance of the policy? Is it a true statement?

A. The company does not require an examination. May I elaborate on the point?

Q. Yes.

A. If the insured still desires a policy and wishes to go to his own doctor and submit additional medical evidence, that is his own choice. We do not require it, but he has that privilege.

Q. That would be in the event the information he submits would lead you to believe you did not want to take the risk based on the application alone?

A. That is correct.

Q. Then if you declined it and he wanted to furnish additional information he could do it?

A. Yes.

Trial Examiner Hier: Let's get this straightened out. No medical examination is required prior to issuance.

The Witness: Yes.

Trial Examiner Hier: But a medical examination may be required prior to payment of claim?

The Witness: No. We reserve the right to examine to determine the extent of the claim. That's in your stand-[fol. 223] ard provisions. We have no control over that. That's your state regulatory provisions in practically all of the states.

Trial Examiner Hier: You mean that is required by the State?

The Witness: That is right. You have an option in there, but you have a standard or optional provision.

Trial Examiner Hier: But you can't put it in or leave it out?

The Witness: I think that is the requirement. I am not certain. There are some options, but the text of it—you have to follow the text.

Trial Examiner Hier: I understand the text can't be varied, but you don't have to put that provision in the policy if you don't want it.

The Witness: It would have no reflection on the charge, whether it is in or out.

Q. (By Mr. Langs) Mr. Korn, I refer you to Commission's Exhibit 12(a), a policy which has on the back of it, the last sheet, what is called standard provisions, and I refer you to standard provision number eight. Would that help you in answering the question of the Examiner?

A. Only to this extent: As long as I have been with the National, and from my experience, the companies have always included that question. It may be an optional provision as a state requirement.

Q. What does this heading of so-called standard provisions in the policies mean? Is that standard in all companies or standard with National?

[fol. 224] A. In 1911 or '12 through, I believe,—that is before my time—the National Association of Insurance Commissioners or a comparable body of State regulatory officials designed the so-called standard provisions. All of the states did not pass laws incorporating such a set of provisions in their statutes, but the states that did that, passed an act incorporating said provisions, did accept policies with the provisions in them and approved the policies. That has been the practice until, I would assume, 1950, I believe, and again through the efforts of the National Association of Insurance Commissioners and the industry they now have developed what we call the uniform provision act, which supplements the standard provision, and as I understand, there are some thirty-odd states that have now approved it. Each year they are added, and there is possibly forty states that have the uniform provision, which will be a requirement in all policies.

Trial Examiner Hier: I don't think that language is too clear in this respect. Do you mean by that, that that provision must be in any A and H policy, or do you mean that if the company elects to have a provision of that nature in there they must use that particular language?

The Witness: I can't answer your question because I do not know. There are a certain number of those provisions that are no election. They must be in. There are about six or a half a dozen of them that are optional provisions, and you can put those in if you so choose.

Trial Examiner Hier: But if you do use those you have to use that language?

[fol. 225] The Witness: That is correct. Some of them are not required, but I do not know all of the options.

Mr. Langs: We can check that bit of law and make that available.

The Witness: If you phone the office you can get it.

Q. (By Mr. Langs) Do you know of any non-cancellable insurance policies that do not provide for or do not have this provision included in it, "No medical examination required"?

A. You have two "nos".

Trial Examiner Hier: Yes, you have got a couple of negatives there. Do you know of any that do have?

The Witness: That do not require physical examination?

Trial Examiner Hier: That's correct.

The Witness: No, I do not know of any that do not require a physical examination.

Trial Examiner Hier: In other words, if the policy is non-cancellable the prospect must take a physical examination?

The Witness: Yes, to my knowledge.

Q. (By Mr. Langs) And if the policy is cancellable, no medical examination is required?

A. I can think of one exception. There are some companies I believe now that issue a non-cancellable accident-only policy that will accept the risk on the basis of an application, I am quite certain, without medical.

Trial Examiner Hier: That is accident only?

[fol. 226] The Witness: Accident only. No health question involved.

Q. (By Mr. Langs) We are talking about A and H, accident and health, both.

A. Yes.

Q. Now, we go on to the next statement which has been set forth in the complaint, and I refer you to Commission's Exhibit 6(j), and I ask you to note the language there that has been circled, and you will find there the statement, "The most complete coverage at the lowest rates. Monthly benefits up to three hundred dollars per month paid from first day of any sickness or accident plus

three hundred dollars per month of hospitalization". Are you familiar with that statement?

A. Yes. What the statement purports, I am.

Q. That's what I mean. You are familiar with that statement being used in advertising literature which is distributed by National Casualty?

A. That's correct.

Q. And do you know for approximately how long a period of time that language, exact language or language similar to that—the figures may be changed or words, slightly—has been used by National in the literature which has been distributed in connection with the policy?

A. You have two sections here.

Q. Talking about the one I read.

A. You read both, which one? I would like to make a comment about both.

[fol. 227] Q. All right.

A. "The most complete coverage at the lowest rates." Such an expression is to be used, maybe not the exact terminology, but it has been used for some time, expressing the coverage at presumably the most favorable rates.

The second one is more generally used. It has been used, I assume, as long as I can recall, when you speak of monthly indemnity. It merely purports to state what amount of monthly indemnity is available, and under what conditions is it paid, from the first day of any sickness or accident.

Q. And that has been used for many years?

A. In various forms, depending on the particular policy to which it is applicable.

Q. Now, during all of this period of time have you ever had an insured come to you who purchased a National Casualty policy, and indicated that he or she was misled in the purchase of that policy by virtue of the language which has been quoted here, or language similar to that?

A. No, sir.

Q. Have you received any complaints through any of your department heads to you as the administrative head that an insured has complained to the company that they were misled, he or she, in the purchase of a policy by virtue of this language?

A. No, sir.

Q. I show you Exhibit 15(e), Commission's Exhibit 15(e), and Commission's Exhibit 18(g), and you will notice [fol. 228] certain language set forth there, and you will find it reading as follows: "Hospital room and board for one hundred days for each sickness or accident. Your choice of plans paying from five dollars to twelve fifty per day. Pays full benefit even if your hospital room costs less." Are you familiar with that language or similar language?

A. Yes, sir.

Q. Has that language been used in literature which has been distributed by the National Casualty Company?

A. That's correct.

Q. And over what period of time?

A. The amounts may vary, the period may vary. It depends upon the specific policy to which it is applied, but the same phraseology, modified somewhat, has been used as long as we have been selling hospitalization insurance.

Q. During this period of time has any insured come to you and informed you that they were misled in the purchase of a National Casualty policy because of or by virtue of this language?

A. No, sir.

Q. Has any information come to you, as the administrative head of the company?

A. No.

Q. Through any of your departments, that some person had purchased a National Casualty policy and claimed or contended they were misled in the purchase of that policy by use of this language?

A. No, sir.

[fol. 229] Q. I show you Commission's Exhibits 15(f) and 18(d), and ask you if you will note the material which has been read, and you will find there this language:

"Fifteen dollars per day" in a box. "For hospital room and board for one hundred days, each disability." Are you familiar with that information?

A. Yes, sir.

Q. Has that language been used or language of similar purport, in advertising, by National Casualty Company in the distribution of literature?

A. Yes, sir.

Q. And over what period of time?

A. Speaking of this particular one, or the same phraseology?

Q. The same phraseology, or, where the figures might change, one of similar purport.

A. If it refers to a specific policy, that I do not know, but the essence of the phraseology has been used for many years in connection with hospitalization insurance.

Q. Now, in there there is an amount per day and there is a number of days. Over the period of years has the benefits varied or changed in that type of policy?

A. That's correct, it has.

Q. From the beginning there have been changes?

A. Yes.

Q. So that years ago instead of being fifteen dollars per [fol. 230] day it might have been ten dollars a day, or something like that?

A. Farther back than ten years ago we only sold five dollars a day.

Q. Now, has anyone, during the period of time that this language has been used, come to you and indicated to you that they were misled, he or she were misled, in the purchase of a policy from National Casualty Company by virtue of this language

A. No, sir.

Q. Have you received any information, as the administrative head, through your departments, that any complaint by an insured has come to you, through them to you, that an insured has said, "I was misled in the purchase of a National Casualty policy by virtue of this language,"?

A. No, sir.

Q. I next show you Commission's Exhibit 11(e), and Exhibit 12(d), and ask you to note the material that has been circled. "Surgical operations, whether performed in or out of the hospital, are paid up to three hundred dollars in addition to hospital benefits. Full benefits are paid to all insured members of the family group." Do you recall that language?

A. Yes, sir.

Q. And that material, that statement or language, has

been used in information that has been distributed by the company?

A. That's correct.

Q. For how many years?

A. I am not in a position to say how many years this particular item has been used, but the same intent or benefits—[fol. 231] whatever they may be—has been used since we have been selling surgical insurance.

Q. In other words, language similar to the quoted language has been used over many years?

A. Yes.

Q. And the amounts or other statements which might apply to the specific term of the policy has been changed, but the general tenor of the statement has been used for many years?

A. Yes.

Q. During the course that this statement has been used have you ever had a person who purchased a policy come to you and state they have been misled in the purchasing of such policy by virtue of this language or language of similar purport?

A. No, sir.

Q. Have you ever received any information from any of the heads of your departments, as administrative head of the company, that any person has complained to the company that they were misled in the purchase of a National Casualty policy by virtue of this language or similar language

A. No, sir.

Q. I show you Commission's Exhibit 15(e) and 18(g) and ask you to note the material circled, which material you will find reads as follows: "Surgery bills from five dollars to three hundred dollars for sickness or accident." Are you familiar with that information?

A. Yes, sir.

Q. Has that information or information of similar pur-[fol. 232] port been used by National Casualty Company in its advertising material?

A. Yes, sir.

Q. And for how long a period of time?

A. Since we have been selling surgical insurance.

Q. And during that period of time have you had any insured who had a National Casualty policy come to you and state that they had been misled in the purchase of their policy by virtue of this language or language of similar import?

A. No, sir.

Q. Have you received any information, as administrative head of the company, from the several departments, that someone had complained to the company that they had purchased a National Casualty policy and were misled by virtue of this language to which I called your attention?

A. No, sir?

Q. I show you Commission's Exhibit 6(f) and call your attention to the specific language which has been noted by the Commission in its complaint, which reads as follows:

> "Here is what we would pay you. Monthly income up to three hundred dollars for total disability from sickness paid from first day for two years with no confinement required at any time. Monthly income up to three hundred dollars for total accident or confining sickness disability paid from first day for as long as totally disabled, even for life."
>
> Do you recall that language?

A. Yes, sir,

[fol. 233] Q. That language has been used by National Casualty Company in its advertising material?

A. This particular reference to the particular policy it relates to, yes.

Q. For how long has that language, or language of similar purport, been used by National Casualty Company?

A. Again, as long as that coverage was offered to the public.

Q. During the time that that has been used has any policy holder come to you and indicated that they were misled in the purchase of a policy of the National Casualty Company by virtue of this advertisement?

A. No, sir.

Q. And have you received any information, as the administrative head of the company, through your department heads, that a claim has been presented to the company

indicating that a policy holder was unhappy that he purchased the policy of National, and was misled by virtue of this language?

A. No, sir.

Q. I show you Commission's Exhibit 21(b) and ask you to refer to the matter which has been circled, which matter you will find reads as follows:

"When you are disabled by accident or sickness, what do you need most? Cash. Economy disability policy. The simple economical way to obtain basic income protection. Sound protection—low cost.

"For Accident: Accident income (blank dollars) per [fol. 234] month. Total disability—full monthly benefit for twelve months. Partial disability—one-half monthly benefit for one month.

"For Sickness: Sickness income (blank dollars) per month. Confining total disability—full monthly benefit for six months. Non-confining total disability—full monthly benefit for one month."

Are you familiar with that language?

A. Yes, sir.

Q. And has that language been used by National in its advertising?

A. Yes, sir.

Q. For how long has it been used

A. Since this type of policy has been issued or available to the public.

Q. And during that period of time have there been any complaints which have been made to you, personally, that an insured who had purchased a National Casualty policy has indicated that they purchased it because they were misled by this language or advertising?

A. No, sir.

Q. And have you received any complaint from any of your department heads, as administrative head of the company, indicating that a complaint has been received from an insured who purchased a National Casualty policy, that he or she was unhappy, contending that they were misled in the purchase of the policy by virtue of this language?

A. No, sir.

Q. I show you Commission's Exhibit 8(b), and ask you to [fol. 235] refer to the material which has been circled, and you will find there the language, "Your security. If insured or sick. You are protected while at work or away from work. Benefits paid in addition to compensation and group insurance, twenty-four hour every-day protection. Guaranteed monthly income for accidents. Guaranteed monthly income for sickness."

Are you familiar with that language?

A. Yes.

Q. Has that material been used in the advertising by National Casualty Company?

A. Has it been?

Q. Has it been?

A. Yes, it has.

Q. For what period of time?

A. That I do not know. These cards vary from time to time. I couldn't answer that.

Q. Has language of similar purport been used with reference to similar type of policy?

A. I don't quite understand. You say similar purport? Specifying certain monthly indemnity will be paid for income or by reason of accident?

Q. Yes.

A. Right.

Q. That has been used for how long?

A. "Of similar purport" has been used since we have been selling disability insurance, for years.

[fol. 236] Q. And during that period of time this particular material has been used have you received any complaint from an insured who purchased a National Casualty policy, that they contended they were misled by virtue of this advertising material?

A. No, sir.

Q. Have you ever received information through your several departments, as administrative head of the company, that anyone has complained, who purchased a National Casualty policy, that they were misled by virtue of the language in this advertisement?

A. No, sir.

Trial Examiner Hier: Mr. Korn, Mr. Langs has taken you down over each representation set out in this com-

plaint alleged to be deceptive, misleading and misrepresenting. How vital to your company is the use of those particular representations? What would happen if you voluntarily left them out? To your company's business? Of course, you don't know, but what would you estimate?

The Witness: You mean if you didn't use them?

Trial Examiner Hier: I mean if you didn't use them.

Mr. Langs: If he didn't use these or any advertising?

Trial Examiner Hier: If he didn't use any of these in the complaint?

Mr. Langs: If he didn't use these or used something in the place of it? I am not trying to put words in your mouth. Are you eliminating all advertising?

Trial Examiner Hier: Oh, no, no. I am not eliminating [fol. 237] all advertising. Of course not. But here the Federal Trade Commission says here this material that he has gone over——

The Witness: I get your point. There are certain of those statements that have been taken up that I think are very important, statements of qualifications. We set up a certain thing, and maybe we get a card from a person one year old or a hundred years old if we don't set that up. Other features, if you want accident insurance what would you do? Are they going to give you a hundred dollars a month or two or three? What are they? We have had them ask, "Will you write five hundred dollars a month or a thousand dollars a month?"

We state what we are writing, "How long do you pay? One year, two years or for life?" We state what that particular policy—or what length of time is available on that policy. There may be a few items in there that have been carried through in advertising because of popularity. I don't know. But I think there are some material ones in there that would destroy the knowledge that you are trying to convey to the prospect.

Trial Examiner Hier: What about this specific representation, "No medical examination required"?

The Witness: I don't think that is too important. We have left that out of our circulars in the last two years. As I pointed out, it was quite important when people thought they had to have examinations. I don't think it is material today.

Trial Examiner Hier: The next question I ask you, supposing you put in—put it this way: Supposing you continued to use these representations, but were to add to [fol. 238] them the exclusions which the Commission says make them deceptive, which were in the policy but not in the ad. Those exclusions are set out in Paragraph 5, I think, of the complaint.

Suppose you were to add all of that to your advertising? What effect would that have to your business?

The Witness: That is very easy to answer. Long before the Federal Trade Commission found it necessary to complain against the companies, having been a member of the committee that studied the code of ethics which we adopted, we started doing that as time permitted on our new mailing pieces. As a matter of fact, today we have already—we are talking about something that is non-existent today.

Trial Examiner Hier: In other words, you are doing it now?

The Witness: Yes.

Trial Examiner Hier: It has not destroyed or materially affected your business?

The Witness: We don't know if all companies have followed the same practice, but we think they have. We are all on an equal basis, and we still recite this as available for five, one hundred dollars, whatever it is. I might add, since you have asked that question, one reason why we, and possibly other carriers—although I can't speak for them—may have complaints as alleged—maybe I use the wrong word—the Federal Trade Commission believes or alleges is misrepresentation, is that companies deliver accident and health policies sometimes within twenty-four hours, and I would say at least within a week. If there [fol. 239] is some question as to risk, then the insured has that policy. They don't expect more than that policy, unless there is an intent to deceive or defraud or something else, or a misunderstanding, so the circular becomes a matter of no consideration. They know what they are getting from that policy. They have a copy of the policy. That's why I think my answers, if I have stated correctly, are "no" all of the way through, because within the time the application is received they have a policy to look at.

If they don't choose to keep that policy they can return it in many states, which they do.

In the State of Louisiana we must now make a statement in the policy that this is subject to a ten-day inspection, so advertising would be of no material effect.

Trial Examiner Hier: Go ahead.

Q. (By Mr. Langs) Now, Mr. Korn, I have taken you down through each of these specific items, and where the Commission has picked out certain language and complained about it. Now, without going down through all of them, we have been through them in our conferences in your office and so forth, and you are familiar and are aware of them. Is it true or not that the statements which are set up here are true representations of the material or the effects or benefits of the policy to the extent that they are made? For instance, as a part—just as an example—the statement has been made in the advertising literature, "No medical examination is required". That is a true statement?

Mr. Brookfield: I object to the form of the question, your Honor.

[fol. 240] Trial Examiner Hier: Well, the form is bad.

Mr. Brookfield: The policies speak for themselves, sir.

Trial Examiner Hier: I know that.

Mr. Langs: I am asking him whether or not these are true statements. This is taken from the literature, and whether or not they represent true statements of the information which this company wants to pass out—are they true statements with respect to the policy which you are selling? They are or they are not, is what I want to know.

Trial Examiner Hier: You may answer that.

The Witness: I was a little confused for the moment. We are speaking about advertising material statements, and the attorney for the Government is speaking about what is in the policy. Are we talking about advertising or about a policy?

Trial Examiner Hier: We are talking about advertising statements.

The Witness: They are correct statements.

Trial Examiner Hier: This is not falsity—not a falsity case, as I see it. It is a deceptive or misrepresenting case.

These statements are true under certain conditions, and there are exclusions and other conditions, and that is where you claim deception.

Mr. Langs: You made the statement just now they are true under certain conditions. These statements are true at all times.

Trial Examiner Hier: Well, from one point of view, that's true, yes, but what I am trying to express—undoubt-
[fol. 241] edly I am doing a bad job of it—if the statement is true, but when you take some exclusion into the picture the inference from the true statement which the person may get is not as broad as he thinks it is. That is their case, if I understand it correctly.

Mr. Langs: That, I think, is what their case is, but certainly on the basis of the evidence——

Trial Examiner Hier: I am not saying that is a fact. I am saying that is their case.

Mr. Langs: We do not believe that you can draw inferences which they have indicated here from these statements. These statements are true. The fact that these witnesses have testified that no one who has purchased these policies, and they have sold them in literally hundreds of thousands, that information is in the record which went in under the direct case of the government, literally hundreds of thousands of these policies have been sold, and this advertising material or a similar purport of it has been used and no complaint has come in at all.

Trial Examiner Hier: I understand your position. In the first place, there is no way you can possibly prove that nobody has been deceived or misled, unless you called in this court room I suppose three or four hundred thousand people, some of whom are dead and passed on. The most you can do, I think, is what you are doing, but it is negative evidence. I mean the fact that nobody has complained here doesn't mean that somebody hasn't been mad or gotten irritated or dropped the policy or cussed you out to his neighbor or something else, without making a formal complaint to him.

[fol. 242] Mr. Langs: Well, your Honor, I think we both know human nature enough, and I think it is sufficient to take judicial notice if you have got several hundred thousand people somebody is going to have a grievance, they

are going to raise it. You can't take all of those people and say that none of them would raise a grievance. It just isn't normal. It is normal and natural that somebody would say something about it. That is the reason why people write letters to the public letter box. They have a grievance and they have a squawk. They complain. It is just natural —it just naturally and normally follows that such is evidence of that fact.

Mr. Brookfield: Mr. Examiner, are we going to argue that point now? I would like to put in my two bits' worth.

Trial Examiner Hier: No, you will have your chance later. I will give you plenty of time.

Q. (By Mr. Langs) The question was raised, Mr. Korn, with reference to the schedule of benefits under the surgical policy, as to how it was determined where a particular item was not specifically covered and it used the language "On a commensurate basis", can you indicate the method which the company uses in determining the commensurate basis?

A. Years ago when they developed a surgical schedule they showed specific items. Space did not permit the incorporation of all items of surgery that would be covered or treatment that would be covered under a surgical schedule. We tried to be comprehensive. The schedule as used today has been reviewed by medical examiners, doctors, industry sought their advice, and we picked out what was presumably [fol. 243] a fair representation of average surgery procedures.

In the event an insured has a claim for surgery or medical treatment coming within the scope of the surgical provisions, the company then will pay that loss commensurate with a comparable operation that is so listed. I don't know exactly the procedure. I don't think it is the judgment of the adjuster. I think they discuss that with the medical director to get his opinion as to what that degree or that nature would be a comparable procedure.

Q. After the medical directors of the company indicate what their thinking is on it, is that followed?

A. We pay it accordingly, and if there is still some question the insured may present a statement from the surgeon

showing a more severe operation which would give reason for reconsideration whether a larger amount should be paid.

Q. In other words, that determination is made by the medical director under the assistance of the doctor, so that there can be an actual comparable situation developed from medical knowledge?

A. Yes.

Mr. Brookfield: I object to that question.

Trial Examiner Hier: What?

Mr. Brookfield: That is another leading question.

Trial Examiner Hier: You say it is leading?

Mr. Brookfield: Yes, sir.

Trial Examiner Hier: It is. I will sustain the objection.

[fol. 244] Mr. Brookfield: May the answer be stricken?

Trial Examiner Hier: If the answer was given it may be stricken.

Q. (By Mr. Langs) Mr. Korn, do you have any opinion as to the public's reaction to this literature that we have been discussing here today which has been issued by the National Casualty Company?

A. Only to this extent: The National Casualty Company and other companies—not only those that have had complaints filed—but were extremely surprised that the Federal Trade Commission or their people who had reviewed this came up with such complaints against these provisions.

Q. Do you have any knowledge of any—when I say "public" I mean persons, individuals?

A. Oh, I beg your pardon.

Q. As to their reaction to this literature, other than what you have already given?

A. No, not to my knowledge.

Cross-examination.

By Mr. Brookfield:

Q. Now, you said yesterday you were a member of a committee on ethics which has adopted new advertising material, is that correct, or recommended new advertising material?

A. I was not on that specific committee at the time. I was on the executive committee that approved the action of the sub-committee.

Q. Now, when was this committee set up?

[fol. 245] A. Oh, that was a standing committee of the Trade Association. I don't know. It may have been twenty years or more.

Q. That's a standing committee of a——

A. A trade association.

Q. Insurance committee or insurance trade association?

A. Yes.

Q. What is the name of that committee?

A. The Health and Accident Underwriters' Conference.

Q. Has this committee taken any action recently with reference to advertising?

A. When you say "recently", not—well, they have all through the years, but more effectively back in May, I believe, 1954. They are always watching the so-called standard practice of insurance. That is the purpose of that committee.

Q. And they make recommendations to the members of the Association?

A. That's right.

Q. As to what advertising statements are made?

A. Advertising and all practices may come to their attention.

Q. In May, 1954, they made——

A. The Trade Association adopted the recommendation of that committee.

Q. Of your committee?

A. Not my committee, but the committee of which I was on the executive committee that approved the so-called [fol. 246] sub-committee's recommendation.

Q. Did this committee discuss or revise the type of statements that were read to you yesterday by Mr. Langs?

A. Some of them, yes.

Q. And changed them?

A. Yes, they—apparently they made some modifications, saying they should be changed to some degree and what not, but they didn't specify any specific company's advertising. It was just a general discussion of what might be in adver-

tising and what should not be. It is on record. I think it is called the Ethics Standard Advertising that was adopted.

Q. Was this action taken because there was a feeling that maybe this advertising might have a tendency to mislead?

A. No, I don't believe so. At that time I wasn't a member of the committee. I think it has been the practice of that trade association, as well as others, to try to improve, to the extent the companies could, the members could, the public interest, trying to improve conditions. It not only involved advertising. It involved relationship with the policyholder, the agent and everything else. That comes within the scope of that committee's study. You don't progress without improvement, and of course we are always trying to improve.

Q. Mr. Korn, do you know—and if you don't know——

A. Pardon me?

Q. Do you know whether or not as a result of this report that many companies are putting the conditions and exclu- [fol. 247] sions of their policies in their advertising?

A. Yes, they are. In fact, we are also. To that degree I might add the members adopted this code of ethics set forth by this Business Standards Committee—I forget the exact name—and we started back after May sometime of 1954 to remedy such pieces as we thought were necessarily obsolete, some, change some.

Q. You felt, did you not, that the failure to reveal the conditions and exceptions of the policy might cause the public to expect more coverage than they were going to get from the policy?

A. We didn't feel so, but it was the general opinion if that is what the public wanted it was the—I think to resolve that issue you are asking now was a member of the press, notorious press in some instances started issuing articles, picking out out of context certain phases of the insurance business. We didn't feel it was necessary, but since they chose to take such exceptions we felt that, all right, we will try and do what we can as an industry to improve it.

Q. Mr. Korn, is it not a fact that your accident and health policies are sold to people in all walks of life, and people of varying degrees of education and income?

A. Yes, I imagine so.

Q. You don't cater to any particular grade or class of people?

A. No, other than if they can qualify for the insurance. We might not take imbeciles or things like that, but as far as the public in general, if they have an insurable interest.

Trial Examiner Hier: You say, Mr. Korn, you have been [fol. 248] changing your advertising, including the exclusions and so on and so forth. In this particular case what has been changed?

The Witness: We don't think there is a great deal of change other than we did add the so-called exceptions. We have exceptions in the policy.

Trial Examiner Hier: All of these representations in this trial?

The Witness: Shall we say the phrases used by the FTC, but where we put in the exceptions we have eliminated possibly a word here and there that might denote something else. I have seen the revised ones. We have discussed them, and I am not too familiar with exactly the various points in that regard, but we followed this code of ethics which was adopted back in May of 1954; shall we say it was suggested the companies adopt it. It wasn't mandatory.

Trial Examiner Hier: Do you still advertise "No medical examination required."?

The Witness: No, we do not.

Trial Examiner Hier: Then, as I get the picture, you have voluntarily given up most of what the Commission wants to give up? You don't want the order to do it? You don't want to be found in delicto, so to speak, but you have voluntarily done it?

The Witness: The Trade Association, as I made the comment yesterday, back some twenty or twenty-five years ago, when people thought it was a burden to buy an accident and health policy with an examination, that is, as I made the [fol. 249] statement yesterday, within the last eight or ten years, possibly, people don't think of that, and so why put something in? I don't think it is too material to have it in or out, so where it isn't material we drop it. It wasn't because of the FTC charge. We did that long before that was brought to our attention or any company's attention.

Trial Examiner Hier: How much prior to the institution of this proceeding was that?

The Witness: We started back in—I am not sure if it was back in May or June when we started initially changing—and I think it was early in September or October when we became more specific, having thousands of pieces of various advertising, it took some time to coordinate that.

Trial Examiner Hier: When you sent this material in to the Federal Trade Commission at their request did you advise them of that

The Witness: Advise them of what?

Trial Examiner Hier: That you had changed?

The Witness: No, they asked us to send what pieces we were using at that time. That was back in 1954?

Trial Examiner Hier: It must have been.

The Witness: I believe so. The Spring of '54, but prior to that is when the trade association began their study, and they had been studying it for some time, and they made their suggestion.

Trial Examiner Hier: All right.

Q. (By Mr. Brookfield) Mr. Korn, is it not a fact that the [fol. 250] purchasers of the policies called the company's agents, and in some instances the company itself, and asked for an explanation of the conditions of the policies?

A. You say is it not a fact—. I don't quite get your question.

Q. I will repeat it.

A. Yes, please.

Q. Is it not a fact that purchasers of the company's policies called its agents, or in some instances the company itself, and asked for the explanations of the conditions of the policies?

A. Yes, I imagine so. Yes. They have a policy and possibly they would like a more complete explanation of some parts.

Q. Do you agree with Mr. Tolmich that the purpose of your advertising is to obtain the names of prospects who may be sold policies?

A. Primarily, yes, sir. I say primarily because there are certain pieces that might be termed sales aid. It outlines the benefits of or some of the principal benefits in the policies, and we term them as sales aids.

Q. And those sales aids you are referring to are furnished to your agents to aid them in explaining in selling the policy to people from whom they have gotten leads?

A. That's right. It is an explanation. You can see a few of them there where they get put down, "a hundred a month," or write "two hundred" in there, and they have seen that presentation.

Q. Mr. Korn, do you differentiate in your thinking between any and each, with reference to accidents or sicknesses?

[fol. 251] A. When you say "differentiate", I think that word in general is synonymous. It is "each or any covered", sickness or injury.

Trial Examiner Hier: Suppose Mr. Tolmich inserted the word—I believe he inserted the word "indemnify."

The Witness: That's correct.

Trial Examiner Hier: I gathered that from his testimony.

Q. (By Mr. Brookfield) Mr. Korn, *it is* not a fact that many people of limited education or knowledge of the English language are prospects for your accident and health insurance?

A. You say they buy only hospital?

Q. I will restate the question again. Is it not a fact that people—many people of limited education or knowledge of the English language are prospects for accident and health insurance, and especially prospects for hospitalization insurance?

A. I wouldn't say they are especially prospects for hospitalization insurance, and I wouldn't say there are many. I am no judge of how many are illiterate. Could you answer the question, if I may ask? I don't know how many.

Q. Mr. Korn, this phrase, "I understand this peace of mind and security will be mine from the first day, even for life," would you not say that that conveys to the reader the impression that as long as he pays the premiums he will receive the benefits that are set out in the insurance policy?

A. No, sir. Absolutely not. You couldn't give that con-

[fol. 252] struction to that particular phrase.

Q. What would you say that means?

A. It means in benefits—we use that phrase in life insurance as we do in pension. You can—if you do a certain thing or if you qualify, if you have a certain thing, then you might have peace of mind.

Q. And if you buy this policy and pay your premiums then you have peace of mind, is that it?

A. No, because that particular phrase refers to the benefits you would receive, which would give you peace of mind if you were eligible for those benefits. It doesn't say anything about a policy in that statement.

We don't say "This policy will give you peace of mind." I don't believe that is in the text of that phrase.

Q. Mr. Korn, is it not a fact that any business which is conducted through salesmen is continually faced with the problem that the salesmen let their enthusiasm and desire to produce make statements that would not be approved by the principle?

A. Oh, absolutely, yes, but there are various regulatory bodies. Your State Insurance Department, your qualifications for license, your companies are required to give educations in certain areas. California has a specific requirement they must go through a training course. There is schooling to get your license, so to that degree every effort is extended to keep an agent from making false statements or getting a policy issued on the basis of a false statement of which he is responsible. That will always happen in sales.

Q. No matter how carefully the company is, that happens? [fol. 253] A. I don't think you can eliminate it entirely, because we are dealing with personalities, but when that is disclosed then the companies have the privilege of cancelling the agent's license or the insurance department will.

Q. The accident and health hospitalization business is highly competitive, isn't it?

A. Very competitive.

Q. And each company, including National, attempts to create in the mind of the prospect the idea that its policies offer a little more or more than comparative policies, isn't that true?

A. The particular policy for the premium, yes, and the company behind it.

Q. So that when you say the most complete coverage you convey the idea that the policy covers everything, do you not?

A. No, not necessarily. You are stretching the imagination of the word "complete", aren't you?

Q. I am asking you how you use it.

A. I think you have to put it in context.

Q. "The most complete coverage"?

A. No, I wouldn't say so.

Q. You use that phrase, do you not?

A. Yes, we use it, but you have to take the whole article to which it refers. It is a matter of opinion.

Q. "The most complete coverage at the lowest rates"?

A. That's right. We think it is.

[fol. 254] Q. Then——

A. That particular policy. We are not saying all of them.

Q. The purchaser would certainly be led to believe——

A. That's right.

Q. —that he is getting the most complete coverage?

A. We think he is getting that for that premium with our company.

Q. Now, your lowest rates, that applies to what he pays for it?

A. That's right. Absolutely. It is a matter of opinion.

Q. You don't say "the most complete coverage at competitive rates." You say "the most complete coverage", one sentence, and "the lowest rates".

A. I still say it is a matter of opinion.

Q. And it may be interpreted by you or by me or by a member of the public in three different ways?

A. Maybe so. We say that's what we are thinking, that's what we are trying to sell. You sell a lot of articles, you point out that in your opinion they are the best.

Q. Mr. Korn, you believe your contact advertising sets out the exceptions and limitations of the policies, and this advertising would attract as many prospects as the advertising you have been using over the years?

A. Yes, but I will add one statement to that. I don't know if it will attract as many. I can't say that specifically. We don't think it will hurt too much, but I do think it will cause

a greater degree of misunderstanding by doing it than exists, or that you allege exists.

[fol. 255] Q. Mr. Korn, is it not a fact that the schedule of surgical fees set out in your surgical policies is usually less than the customary and usual charge for those operations?

A. I wouldn't know if it was less. It is what a man buys. He might buy less. Those schedules are presumably standard as approved as standard charges for specific operations of the various doctors' asociations. That's how the companies compile them. In different areas it differs. Your cost differs from one end of the country to the other, and from Metropolitan to Urban, so I couldn't answer that the way you have presented the question.

Q. When were those standards adopted?

A. That has been going on for twenty years or more. Possibly in the surgical field fifteen years, since hospital surgery insurance became prevalent.

Mr. Brookfield: Thank you, Mr. Korn. That's all, Mr. Examiner.

Mr. Langs: Just a minute.

Redirect examination.

By Mr. Langs:

Q. A moment ago, Mr. Korn, in answer to a question about the effect of amending the advertising material you stated that it possibly might make for more confusion or make for more difficulty so far as the prospective purchaser was concerned. Will you elaborate upon that?

A. Very glad to. That's a personal opinion for the reason that the policy governs the company's liability, [fol. 256] what they insure. Anything you put in advertising is not a part of the policy by legal contract, so the inference might be made that you say this is here and this is there. You can't put everything. You can't write the complete policy in an advertisement of any kind, and I am not familiar, but I am quite certain that people and attorneys will try to construe the advertising material as part of the policy because it was stated in such fashion that neither

one—one would be conclusive and the other would not be conclusive of all of the facts in that policy.

Q. And do I understand what you are saying in words a little bit differently, but if you tried to put in, as lawyers, if you tried to put in certain exclusions or certain items into a statement which did not include all of them, sometimes you get into more trouble than if you leave out all of them and allow the legal document to speak for itself?

A. That's right.

Trial Examiner Hier: What has been your experience since you have been doing that for a while?

The Witness: Pardon me?

Trial Examiner Hier: You have been doing that for a while?

The Witness: Yes, but we haven't had any experience sufficient to answer that question. To my knowledge I don't know that that has come up. I am thinking of the legal side of any case, and the policy specifically states that the application and the policy is a complete contract. Now, you can't bring in the advertising material and base a law suit on that contract.

[fol. 257] Trial Examiner Hier: Not on the contract.

The Witness: That's what I am trying to say. Unless you put the whole policy in your advertising or put the advertising as a part of the contract, I don't know where you are going.

Q. (By Mr. Langs) In other words, times will tell what the effect of this will have?

A. That's right.

Q. It is too early at this point to have experience from which you can judge it, is that correct?

A. Yes. This is our opinion. You put in exclusions. They are the principal things that people think about, but the contract has certain terms, possibly certain limitations. Are you going to put them all in a piece of advertising?

Q. Now, a couple of things that I want to cover here quickly——

Mr. Langs: Mr. Examiner, you asked a question a moment ago of Mr. Korn about the recommendations of the Committee of the Trade Association, and the fact that they had been working on it for a long period of time, and then

in May they adopted certain things which this company immediately started to put into effect in the matter of thirty or sixty days thereafter, which was prior to the time of the action which was instituted here by the Federal Trade Commission, and I was well aware of that situation, and that was the reason why I asked in this case for a Trade Practice conference for this company to present to the Federal Trade Commission the evolution of the advertising and what had happened as a result of this committee action and what this company had done with regard [fol. 258] to it before this Federal Trade Commission had undertaken this action.

I simply point that out at this time to indicate why the request was made in the beginning of this case for that conference.

Now, a few questions here, and then I'll—incidentally, we had a question up yesterday concerning a standard provision which is contained in a contract, and which the Federal Trade Commission counsel asked a question about, and then your Honor asked whether or not it was mandatory to be included or excluded, and for the purpose of the record I call attention to Section 522.14 (8), Sub Paragraph 8, of Compiled Laws of 1948 of the State of Michigan. That's section 14—13, 14 and 15—of the law, as it exists and is in effect today. There are changes in this law that are going to become effective as of January 1, 1956, but we are concerned only as it exists today. It provides certain standard provisions which must be set forth verbatim in a health and accident policy, accident and health policy, and this provision number 8, which reads, "The Company shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death, where it is not forbidden by law."

That is mandatory, and in other words, it must be included in the policy under Standard Provisions, and there are fourteen of those standard provisions which must be included under the Michigan law in the policy, and that answers that particular question, and I refer you to the statutory law for coverage.

[fol. 259] I might also point out that in those sections there are certain other what they call optional standard provisions, and those provisions, to the extent they are used, must be used exactly as it is quoted in the language of the statute. They do not have to include them, but if they do include them they have to include them as the language of the statute—as the language of the statute reads.

Q. (By Mr. Langs) Mr. Korn, are you familiar with the specimen policies that are used by the company as to whether they are the standard size or regular size, or are they in reduced form?

A. They are standard size policies. We have—to my knowledge we do not use reduced policies. By "reduced policies" I mean what has been reduced to half or a fourth of the original policy.

Q. The specimen policy looks exactly like the policy which the man will get when he gets his policy? After he buys the insurance?

A. That's true.

Q. At the time of the hearing in the early part of the year, Mr. Korn, you made mention of the fact that you were being examined at that time by the State Insurance Department under the so-called, I think, regional or a conference——

A. Convention examination.

Q. Convention examination. What is a convention examination?

Mr. Brookfield: Mr. Examiner, I submit this it not proper redirect examination.

Trial Examiner Hier: I don't think it is, either, Mr. Langs. He didn't go into anything on cross examination about that.

[fol. 260] Mr. Langs: What I was trying to bring out was to show that the examination had been concluded. That was the important part of that.

Trial Examiner Hier: Sustain the objection, Mr. McGuire.

Q. (By Mr. Langs) One other point which I want to cover, Mr. Korn. In the cross examination and in your direct examination you indicated your experience about

a claim in the claim department in handling this type of insurance, A and H insurance. Right?

A. Yes.

Q. I think you indicated you had spent around twelve years handling claims of accident and health type policies.

A. That's correct.

Q. During that period of time approximately how many claims did you handle?

A. I wouldn't be——

Q. Would it be thousands, hundreds, hundreds of thousands?

A. I had many personally and in charge of the department that handled some eighty or ninety thousand a year.

Q. And that was over a period of twelve years?

A. That's correct.

Q. So in that period of twelve years you had experience, then, of handling probably as many as five hundred thousand claims, or supervising that many claims under your direction?

A. I was aware of them. Let's put it that way.

[fol. 261] Q. And if there was any major complaint or any problem which would arise, certainly that would come directly to you, is that correct?

A. At various stages of the administration, yes. Possibly in the earlier stages I may not know, but to that degree, usually there are conferences on those issues among adjusters, and I think I would have someknowledge of it.

Q. Now, certain of these phrases that the trade commission—Federal Trade Commission—has set forth in its complaint, you have indicated that they are statements which had been used in one form or another for a period of many years.

A. Right.

Q. Did any of those statements which we covered yesterday, one by one—were any of those statements or similar statements in use while you were in the claim work, claim department?

A. Yes, to a degree they were.

Q. And this one particular statement has been used quite a bit in the complaint, "No medical examination required". Just using that as an example, was that phrase used in the

selling of insurance while you were in the claim department work?

A. Yes, it had some use.

Q. While you were in the claim department work did any claim come to your attention during that period of twelve years where a purchaser of an insurance policy in his claim contended that he was misled as to the amount of his claim, or what his claim should be by virtue of the advertising material used which contained this statement, "No medical [fol. 262] examination required"?

A. Not to my knowledge.

Q. Do you recall any contention by an insured who purchased the policy containing any of these statements which were in existence during that period of time that they claimed they were misled as to their claim or their rights under the policy by virtue of the advertising which was used?

A. No, they have never expressed they thought they were entitled to benefits by virtue of what was said in the advertising because they themselves or by advice of counsel recognized that the contract prevailed.

Mr. Brookfield: Object to that question, your Honor.

Trial Examiner Hier: What?

Mr. Brookfield: I object to that answer. That is purely a conclusion "by advice of counsel they recognized the contract prevailed".

The Witness: I said the people recognized.

Mr. Langs: The first part of the answer "no", is a direct answer to the question.

Trial Examiner Hier: The last part is a conclusion of what he thought. The last part may be stricken, and the first part may stand.

Mr. Langs: I believe that's all I have.

[fol. 263] Louis P. Matthews was thereupon called as a witness for the Respondent, and, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Langs:

Q. Mr. Matthews, you are the same person who testified in the proceeding earlier this year as a witness for the

Federal Trade Commission? They called you as a witness, subpoenaed you in here, is that correct?

A. That is correct

Q. Now, we want to get a little historical background upon your activities in the insurance field. How many years have you been in the insurance business?

A. Over twenty-five.

Q. And during that period of time what type of insurance have you handled? Have you handled A and H, hospital or life, or just what?

A. Practically sold the accident and health insurance.

Q. And during that period of time what type of work have you done in the accident and health field?

A. In the early years I did underwriting, and in the later years, eighteen and a half years, agency work.

Q. And in the underwriting work what did you do?

A. Passed on the acceptability of the risk, according to the application received, saw that the rates were correct, all questions answered. In other words, all work preparatory to the actual issuance of the policy.

Q. What has been your work in the agency field?

[fol. 264] A. In the agency field it has been—of course, the agency field is the sales end of the game, the production. The appointing of agents, ascertaining of ways and means to locate prospective agents, assisting in the recruiting of agents, visiting them on field trips, helping them solve their problems, helping to prepare policies to some degree, assisting in advertising material. That covers it pretty well.

Trial Examiner Hier: It is agreed, Mr. McGuire, between counsel the witness presently on the stand, Mr. Matthews, would, if asked to testify with relation to each advertising representation set out in the complaint, to the same effect as the witness, Peter G. Korn, testified, and with the same cross examination. Is that agreeable, gentlemen?

Mr. Langs: It is agreeable with me.

Trial Examiner Hier: Agreeable?

Mr. Brookfield: Yes, sir.

Q. (By Mr. Langs) .... Now, you have indicated here as a part of the opening questions and answers that you have participated in the preparation of advertising material. What are the things which you give consideration to in preparing that advertising material?

A. In preparing advertising material of course it must be visually attractive. As regards the phraseology, we endeavor to insert the highlights of our policies as they might differ from policies of other companies. Not all other companies, but other companies, so that the recipient will have his interest aroused legitimately to the actual benefits that will be fulfilled by the policy after the advertising is answered, let us say.

[fol. 265] Q. You mentioned that to indicate differences between other companies—well, let me ask you this question. Are there certain provisions which are standard, so far as this company is concerned, and other companies are concerned, writing the same type of insurance?

A. There are certain provisions that are standard, yes.

Q. Do you highlight standard provisions?

A. No, sir.

Mr. Langs: That's all.

Cross-examination.

By Mr. Brookfield:

Q. Mr. Matthews, before the stipulation, you testified in connection with your duties that you go around with individual agents, is that correct?

A. I don't go around with individual agents. I go and visit.

Q. You don't make any calls on prospects with the individual agents?

A. Very rarely.

Q. So that you don't have any contact with these prospects?

A. I wouldn't say I don't have any contact with them, because I do on occasion.

Q. How frequently?

A. That would depend solely upon whether the agent wished my services in that regard.

Q. Well, would you say that it is customary and the usual thing if an agent has a prospect to sell, an eighty-five or [fol. 266] ninety dollar accident and health policy, that you go out and help him sell it?

A. Not necessarily, sir, because our agents are, generally speaking, sufficiently well trained to take care of their own sales work.

Trial Examiner Hier: How many prospects did you call on last month?

The Witness: When you say "last month", I haven't been in the field in the last month.

Trial Examiner Hier: How about the month before?

The Witness: I would say possibly I might see half a dozen prospects in the course of the year, because my field trips are about eight weeks, I believe.

Q. (By Mr. Brookfield) Now, when you do go to these prospects do you take your advertising literature or the literature of the company?

A. The agent already has that.

Q. Wait until I complete my question, please.

A. All right.

Q. And read this literature to them and ask them if it is clear to them.

A. I can answer that very very definitely. I can say this. I can't tell you how many prospects I have seen in the course of eighteen and a half years, but I can say on every call that has been made a specimen policy has been shown, and reviewed with the prospect.

Q. A specimen policy?

A. Definitely.

[fol. 267] STIPULATION RE TESTIMONY OF WILLIAM ZELL

Trial Examiner Hier: All right, Mr. McGuire, in lieu of calling Mr. William Zell to the stand, who was a witness here before, it is stipulated between counsel that he would testify on direct and cross examination, if called, to the same effect as Mr. Korn did, and as Mr. Matthews was stipulated to, with reference to each of the alleged misrepresentations in the Complaint.

Mr. Langs: I believe that concludes the case of the Respondent on the matters in issue, subject, of course, to the motion which we made, and which we reserve the right on that, for any further action which may be necessary.

Trial Examiner Hier: Do you have anything more?

Mr. Brookfield: I think not, Mr. Examiner. I have rested.
Trial Examiner Hier: The case is closed.

[fol. 268] BEFORE THE FEDERAL TRADE COMMISSION

INITIAL DECISION—Entered December 8, 1955

Frank Hier, Hearing Examiner

Complaint herein issued March 11, 1955, charging respondent with misrepresenting its accident and health policies by soliciting their sale through printed brochures and advertisements which stressed or mentioned or mentioned only maximum benefits or coverage while omitting actual policy exclusions or limitations thereby deceiving or misleading prospects into purchasing policies not as extensive or secure as they believed, in violation of Section 5 of the Federal Trade Commission Act (Title 15, U. S. C. A. 45). Answer admitted descriptive facts alleged and denied misrepresentation, and jurisdiction to proceed.

On the issues joined two hearings were held to complete proponent's proof, at the close of which respondent's counsel moved to dismiss the complaint for lack of jurisdiction and insufficient proof to constitute a prima facie case. The jurisdictional attack was two-pronged and founded on the language of so-called Public Law 15, 79th Congress (Title 15, U. S. C. A. 1011-15). The contentions were that since respondent is a Michigan corporation and Michigan by statute expressly prohibits the acts of alleged in the complaint there was none of respondent's business that was not "regulated by State law," and that even if the Michigan statute be held to have no extraterritorial regulation that, nevertheless, respondent's business was fully regulated by the separate law of each state where it does business. The first contention was denied substantively, the second solely because at least one state where respondent does business, Mississippi, admittedly has no regulation whatever. The [fol. 269] second ground of the motion that no prima facie case had been shown was denied on the merits, and subsequently two additional hearings were held for the reception of respondent's evidence, proof taking was closed and proposed findings of fact and conclusions were submitted

by all counsel, on consideration of which, with the rest of the record herein, the Hearing Examiner finds that this proceeding was brought in the public interest and makes the following:

Findings as to the Facts

1. Respondent National Casualty Company is a corporation organized, existing and doing business under the laws of the State of Michigan with its office and principal place of business at 422 Majestic Building, Detroit 26, Michigan. It is a stock company incorporated for the purpose of selling accident, health, and all types of casualty insurance, being licensed to sell such policies in all States of the United States, the District of Columbia, and Hawaii, through resident agents located therein. The company does not sell life insurance and its casulty insurance is not involved in this proceeding. In 1953 respondent received premiums of $15,519,025 and in 1954 premiums of $16,208,154 on its accident and health policies.

2. Respondent uses the agency system of selling its insurance policies by solicitation from 350 to 400 direct but independent insurance agencies throughout the nation who operate under contract of the respondent on commission only, in nonexclusive territories, and for this purpose respondent prepares, sends and ships to these agents direct [fol. 270] mailing cards, stuffers, one page lead sheets, form letters, applications with tear sheets and throw aways. The majority of this is shipped by mail to the agent in bulk for his use and dissemination. Something less than five percent of respondent's direct mail advertising is disseminated by respondent directly from its own offices in Detroit to members of the public on behalf of its agents, and at their request, to obtain leads from prospects. Generally, the company bears the expense of printing advertising prepared by it but the agent assumes the cost of dissemination. The record does not show exactly what printed material was mailed directly by respondent from Detroit to prospects, as hereinafter found in Paragraphs 9, 12, 15, 19 and 23. All it shows is that something less than five percent of respondent's business was done that way. For the purposes of this discussion therefore, it is assumed that some of those mailings were of the printed material hereinabove found to be misleading or deceptive.

3. Eighty percent or more of all respondent's accident and health policies are issued by it from its home office after receipt, checking, and consideration by it of the prospect's signed application which has been secured by the agent. Any policy issued by respondent is forwarded to the agent for delivery to the insured. A very small number of respondent's agents may issue policies directly but respondent's home office has subsequent veto power over them after consideration of the application and policy which have been forwarded to it by the issuing agent.

4. Respondent now maintains and for the past several years has maintained substantial course of trade in insurance policies in commerce as "commerce" is defined in the [fol. 271] Federal Trade Commission Act between and among each of the States of the United States.

5. Premium collection is the agent's responsibility, only five percent or less being remitted directly to the respondent, and this because of unusual or temporary situations. Premium notice forms are printed by respondent and furnished free of charge to all agents who mail them out locally. Very few such notices are mailed by respondent directly.

6. To procure business, these agents mail locally respondent's direct mailing pieces to likely prospects, secure leads thereby and otherwise, then call and personally solicit the prospect, or they are distributed personally by the agent. Although respondent's advertising pieces exemplified in the record may be primarily for the agent's aid and benefit in his solicitation, there is no doubt that they are also shown in a substantial number of instances to prospects to induce purchase and with that effect. Respondent's agents may locally advertise also but only with prior approval by respondent's home office. The latter does not furnish leads to its agents except on rare occasions. Occasionally also, it will mail out advertising direct from Detroit at the request of some agent because of temporary or unusual circumstances which make it more feasible to do so than to have the mailing done by the agent. Respondent's renewal business is just as important to respondent as its new business.

7. The insurance commissioner of Michigan inspects respondent's acts, practices, and files about every four years

but this inspection is primarily the accounting phase of respondent's business and respondent's officials do not know whether respondent's advertising is examined or not. Respondent's officials have nothing to show approval of re- [fol. 272] spondent's advertising by the Michigan insurance commissioner. In any event it was never submitted to him for approval. Respondent does not submit its advertising to the insurance commissioner of the State of Michigan for approval before it is used. Respondent's business was not inspected by the insurance commissioner of the State of Michigan during the time covered by the complaint herein. By mutual agreement of counsel the years 1953 and 1954 are the period involved.

8. To arouse interest in, and induce purchase of its insurance policies, respondent, in the manner indicated above has made numerous statements and representations in its advertising pieces. Those alleged to be false, deceptive or misleading by the complaint herein, fall roughly into five categories: (1) termination date; (2) physical condition; (3) complete coverage; (4) dollar amounts; (5) specific time covered.

9. Under the first category respondent has represented:

"No increase in premium because of age"
"No decrease in benefits because of age"
"Lifetime accident benefits"
"For employed men and women ages 16 to 69 years inclusive"
"Life indemnity accident coverage"
"For individuals or family groups—ages 1 day to 69 years"
"Security plan with lifetime benefits"
"I understand this peace of mind and security will be mine from the first day—even for life"
"We have removed all age termination limits from the policy"

[fol. 273] 10. Some of these circulars were distributed by respondent directly or through its agents in all states and the District of Columbia. Respondent's officials testified that the statements set out in Paragraph 9 supra, are representations with respect to benefits, not duration; that they were used to differentiate respondent's policies from

policies of other companies which have age limitations more narrow than respondent's and to overcome any impression of these narrower limits which might have been built up in the public mind by old advertising of others when the limitations were more narrow.

11. Whatever the intent, these statements can reasonably be expected to give a substantial number of readers the definite impression that the policy will continue in effect so long as premiums are paid at least until age 69, or even for life, with full indemnification. To those past 45 years particularly this is a most material and important consideration. The fact is that respondent's policies all provide that they may be terminated by respondent at its sole option at the end of any premium period. Two of these policies may be cancelled at any time by respondent. The finding is that the representations made are deceptive and misleading.

12. The second category or alleged misrepresentations involves the statement "no medical examination required" appearing in ten different circulars distributed by respondent in all states and the District of Columbia. It has been used by respondent for 14 years or more, and by accident and health companies for 20 years. Respondent adopted it because accident and health insurance has become widespread only in the last twenty-five years. In its early days, [fol. 274] people had the impression that because life companies required a preliminary medical examination, respondent would also. People "hesitated buying it because they feared it might require a medical examination." "I think it has been (used) merely primarily, let us say, to convey to people that you could get this insurance without going through a lot of red tape."

13. The quoted statement is unqualified as to time, condition or circumstances. Yet respondent's policies all provide that no benefits will be paid for loss resulting from sickness, the cause of which is traceable to a condition existing prior to, or within 15 to 30 days after the effective date of the policy, and that "the company shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pending of any claim hereunder." Respondent's accident policies require that "the loss shall result directly and inde-

pendently of all other causes'' to show which, the insured may have to submit medical evidence, obtainable only by medical examination.

14. Medical examinations are a groundless fear to many people, especially those approaching or in middle age, when functional degenerations set in. They are a nuisance to others. To everyone, any statement about a medical examination is most material. It would have been a simple and inexpensive matter to have added the words ''before issuance of the policy'' to the quoted statement. The bare representation carries, in the Hearing Examiner's opinion, the definite impression that respondent insures without regard to the prospect's physical condition either before or after issuance of the policy. Such being not the fact the statement is definitely misleading and deceptive. [fol. 275] 15. Under the third category in Paragraph 8 supra, respondent has represented that its policies provide:

> ''The most complete and broadest coverage at the lowest rates''
> ''Monthly benefits up to $300.00 per month paid from first day of sickness or accident plus $300.00 per month for hospitalization''
> ''Hospital room and board for 100 days for each sickness or accident. Your choice of plans paying from $5.00 to $12.50 per days. Pays full benefit even if your hospital room costs less''
> ''Guaranteed monthly income for sickness''
> ''Guaranteed monthly income for accidents''
> ''When I am sick $600.00 a month as long as three months''
> ''New modern all-inclusive hospital surgical nurse protection''
> ''Occupational and non-occupational accident fully covered''
> ''Full coverage on or off the job''
> ''Full coverage for female diseases''
> ''You should be fully protected against these expenses''

16. The policies, to sell which, these representations were issued, contain exclusions and limitations which belie ''most complete'' or ''broadest coverage,'' ''fully pro-

tected," "first day of sickness," etc. This indemnity for sickness is payable only for one "which is contracted or begins after this policy has been in force not less than thirty days from its date." Preexisting illness as well as illness during the first thirty days of policy life is consequently excluded. Excluded also are sickness caused by venereal [fol. 276] disease, injury resulting from air travel on other than a scheduled or common carrier, suicide or its attempt, self inflicted injuries, diseases or accidents to the female organs, injuries or illness occurring outside the United States and Canada. Indemnity payments are limited (reduced benefits) when illness or accident is due to tuberculosis, paralysis, hernias, female disease or mental derangement. Some exclude benefits for sickness or accident covered by Workmen's Compensation Acts, others pay only proportional indemnity, if other insurance is carried. Sickness or accidental injury must wholly and continuously disable and prevent the insured from performing any and all duties pertaining to his or her occupation. Specified indemnities for loss of limb or eye provide for immediate and automatic termination of the policy upon payment thereof. In each instance, these exclusions, exceptions and limitations appear in some of respondent's policies, in some instances, in all of its policies exhibited in the record.

17. Advertising pieces containing the excerpts set out above were disseminated either by direct mail (something less than five percent) or shipped to agents and by them distributed in all states in some instances, in a number of states in other instances.

18. The discrepancies between promise and policy set out in Paragraphs 15 and 16 supra, are obviously material and in the opinion of the Hearing Examiner may well be reasonably expected to give a prospect an impression of wider and fuller coverage than he gets. To that extent they are deceptive and misleading.

19. In the category of "dollar amounts" respondent has represented in its advertising pieces, financial benefits for loss, as follows:

[fol. 277] "Surgical operations, whether performed in or out of the hospital, are paid up to $300.00 in addition to hospital benefits. Full benefits are paid to all insured members of the family group"

"Surgery bills from $5.00 to $300.00 for sickness or accident"

"Pays surgical operation expenses $300.00"

"Surgical plan to $300.00".

"Three choices of surgical operation benefits; $5.00 to $150, $7.50 to $225.00, $10.00 to $300.00"

"Your doctor's bills paid at home, at hospital, at doctor's office"

"$10.00-$300.00 available surgical operation fees"

"Pays surgical operation fees up to $150.00"

"Who pays these bills? You should be fully protected against all these expenses. Never before has such protection been offered"

20. Counsel in support of the complaint contended that these statements give the impression that respondent's policies to which they apply "provide indemnification for all operations necessitated by any one case of sickness or accident up to a maximum of $300," and point out that those same policies do not in all cases provide for payments of $50.00 or $300.00 for surgical operations but contain a schedule of rates providing the maximum for only six of the operations listed and that operations for tonsils, adenoids, appendicitis, hernia or hemorrhoids are not paid for unless they occur more than six months after the date of the policy. The contended for "impressions" seem to this Hearing Examiner to be far-fetched and not reasonably to be expected. He does not get the impression from the quoted excerpts that respondent will pay the maximum for all operations—the words "up to" clearly imply in [fol. 278] plain English a sliding or flexible scale of payment, nor is there anything in the quoted excerpts which reasonably gives the impression that all surgery is indemnified, or if it is, that payment will be made immediately or at any given time.

21. Most of the representations set out above in Paragraph 19 were distributed in all states, others only in some states.

22. The finding is that the representations set out in Paragraph 19 above are not deceptive or misleading.

23. The last category of alleged misrepresentations "specific time covered" are exemplified by the following:

"Monthly income up to $300.00 for total disability from sickness paid from the first day for two years with no confinement required at any time"
"Monthly income up to $300.00 for total accident or confining sickness disability paid from first day for as long as disabled—even for life"
"When you are disabled by accident or sickness—what do you need most?

Cash!

Economy Disability Policy

The simple economical way to obtain basic Income Protection

Sound protection—low cost

For —— Accident income $ —— per month
Accident
Total Disability—full monthly benefit for 12 months
Partial Disability—1/2 monthly benefit for one month
[fol. 279] For —— Sickness income $ —— per month
Sickness
Confining total disability—full monthly benefit for six months
Non-confining total disability—full monthly benefit for one month"

"Your security——

If injured or sick ——
you are protected while at work or away from work—benefits paid in addition to compensation and group insurance—24 hour every day protection"
"Guaranteed monthly income for accidents.
"Guaranteed monthly income for sickness."
"Monthly benefits up to $300.00 per month paid from first day of any sickness or accident"
"Sickness indemnity: total disability full monthly indemnity for two years"

24. These representations reasonably give the impression of indemnification in a specific amount for a definite period

of time. "From the first day for two years," "From the first day as long as totally disabled—even for life," "Accident income $—— per month," etc., reasonably convey that impression.

25. Respondent's policies themselves, however, confer the indemnity promised only if the insured is wholly and continuously disabled by sickness and prevented thereby from performing any and every occupation or employment plus being under the personal attendance of a doctor. Obviously, there is much illness and disability which does not meet these requirements, especially during convalescence. Some of respondent's policies require continuous confinement to the house, before respondent will pay. Other exclusions are any indemnity for more than one month where loss is due to tuberculosis, hernia, paralysis, or mental [fol. 280] derangement; no sickness which began before thirty days after policy issuance; disability arising more than 5, 20, or 30 days after the accident; maternity benefits only after policy has been in effect ten months—in other words, respondent gets ten months' premiums before it has to pay for loss of time for maternity. All of these exceptions, exclusions, and limitations, seem to the Hearing Examiner to be highly important to substantial segments of prospects, and unlikely to occur to them as exceptions. The representations reasonably give the impression of definite amounts for a definite time, and to that extent are misleading and deceptive.

26. All of these representations were distributed in a substantial number of states.

27. Respondent's executive vice-president, its director of agencies, its claims adjuster, and its general agent in Detroit, Michigan, all of whom had been in the accident and health insurance business for many years, all testified that they had never personally received any complaint from any insured or from any prospect as to being misled or deceived by any of respondent's representations; that no such complaint had come to them officially through company channels; that no such complaint had ever been received from the insurance commissioner of any state; and that many of these representations had been used up to 20 years, all of them over a period of years. This, of course, is not conclusive. Deception may have occurred without resulting in

written or formal complaint and there may have been complaints also to local agents which were not forwarded to respondent. Furthermore, this evidence at most goes only to show an absence of actual deception. Under many decided cases, actual deception is not essential, [fol. 281] it is sufficient if there is a reasonable probability of deception. Bockenstette vs F.T.C. 134 F2d 369, 371; Empire Oil & Gas Corp. vs U.S. 136 F2d 868, 872; Jacob Siegel Co. vs F.T.C. 150 F2d 751, 755. That respondent's advertising was used largely to distinguish its coverage from those of life companies, or those of other health and accident companies is immaterial, as is the fact that there was no deliberate intent to deceive. Intent is immaterial *in* this type of case. F.T.C. vs Algoma Lumber Co., et al 291 U.S. 67, 81.

28. Respondent also defends on the basis of abandonment or voluntary cessation. The record shows that respondent is a member of the Health and Accident Underwriters Conference, that a standing subcommittee on ethics and practices prepared a code of ethics for such insurance practice, including advertising, that such code was thereafter adopted by the executive committee of the conference in May 1954, of which executive committee, respondent's executive vice-president was then, and had been, for many years a member. The record further shows that thereafter respondent began to discard and discontinue such of its printed material as came within the condemnation of that code, although some of them are still in use. On that basis, respondent claims this proceeding to be moot and not in the public interest and moves dismissal.

29. Dismissal on this ground is discretionary with the Commission—it is not a matter of right, nor does it defeat jurisdiction. Sears Roebuck Co. vs. F. T. C. 258 F 307-10; F. T. C. vs. Standard Educational Society, et al 86 F2d 692, 697; National Silver Co. vs. F. T. C. 88 F2d 425, 427; Hershey Chocolate Corporation vs. F. T. C. 121 F2d 968, 971; [fol. 282] Philip R. Park vs F. T. C. 136 F2d 428. The very fact that an industry committee saw in this printed material the reasonable probability that it might mislead, even though there had been no complaint thereof to respondent in 10-20 years, reinforces the examiner's opinion that, some of it, as above set out, does so. Respondent's discontinu-

ance confirms this. There is nothing in the record to indicate it may not be resumed, in the same or dangerously similar form. The record shows that these "sales aids" are constantly undergoing change, revision, discontinuance, replacement with new ideas, etc. The public interest requires, it seems to this examiner, that it be made sure that it cannot be resumed in any manner.

30. The protection which this respondent sells, while not so vital as life insurance, is nevertheless as important to the insured as his income. An insurance policy is an intangible, incapable of sensory perception like furniture or clothing. It is a series of mental images, imperfectly conveyed by words. "One picture is worth a thousand words" or as Mr. Dooley described documents generally, decades ago—just a "mess of words." The sheer quantity of language in a policy is per se confusing to a layman. The pressure for conciseness and precision, produces, plausibly plain but actually technical language. Expressions such as "due proof of loss;" "if any time limitation of this policy with respect to give notice of claim or furnishing proof of loss is less than that permitted by the law of the state;" "resulting from accidental bodily injury effected directly and independently of all other causes" have rather definite meanings to lawyers, underwriters, and claims adjusters but are not fully understood by laymen. As the Court said in U. S. vs Sylvanus, 192 F2d 96, "It goes without saying almost that [fol. 283] it is extremely difficult for a layman to understand the terms and conditions of such policies as these * * *." Similar judicial comments are legion. Hence respondent's argument that its agents carry specimen policies when selling and sometimes, or always, show them to prospects, is of little merit. As the same Court said on this point "That the policy holders by reading their policies, might have ascertained the conditions and limitations contained therein would not alter the fact, that the policies had been misrepresented, nor would it absolve defendants from responsibility for having made and transmitted such misrepresentations." For these same reasons, the guardian of the public interest in preventing misrepresentation or even misapprhension must be more vigilant, more careful, and more stringent than in other cases of alleged misrepresentation.

Conclusions of Law

1. The complaint herein rests jurisdiction in this proceeding on Public Law 15, 79th Congress (15 U. S. C. A. 1011-5) known as the McCarran Act, the pertinent provisions of which are as follows:

> 1. "That the Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."
>
> 2. (a) The business of insurance, and every person therein, shall be subject to the laws of the several states which relate to the regulations or taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates [fol. 284] to the business of insurance, Provided, that after June 30, 1948, the act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

Respondent has contended from the inception of this proceeding, and now contends, that its business is fully regulated by state law and that, therefore, the Federal Trade Commission is without jurisdiction in this proceeding. The factual basis in this proceeding behind the phrase "to the extent not regulated by state law" is that 36 states have enacted the so-called "Model Code" or "Unfair Trade Practice Model Bill." This "Model Code" was enacted to implement the above-quoted McCarran Act, and prohibit as illegal, the dissemination of false, deceptive or misleading statements regarding insurance in terms as broad as

Section 5 of the Federal Trade Commission Act, and at the same time in far more specific terms as well. The prohibition is implemented by appropriate enforcement and penalizing provisions, so that any licensed local agent may be haled before the state insurance commissioner to show cause why his employer's license to sell insurance in that state should not be revoked because of misrepresentation. In the opinion of the Hearing Examiner, they are fully effective to stop, within the state, the acts and practices charged here. Being an exercise of police power, these statutes obviously have no extraterritorial effect. In addition to these 36 states, eight others have statutes which, while couched in different language or varying somewhat in [fol. 285] detail, are essentially the same in effect as the "Model Bill." Of the remaining five states[1] one—Mississippi—has no "regulation" of the insurance business at all, and remaining four have only statutes which patently refer only to life insurance companies, which this respondent is not.

2. Respondent's contention of no jurisdiction is two-pronged. First, it urges that being a creature of Michigan law, the "Model Code" of that state effectively controls its every activity, intrastate or interstate. This claim of extraterritoriality was rejected as unsound in the denial of respondent's motion to dismiss made at the close of the case in chief, and is again rejected for the reasons then stated. But respondent next urges that, even so, its business is fully regulated by state law wherever it does business. Since it does business in every state and since it is not regulated in any way in Mississippi, this contention was heretofore rejected on its motion to dismiss, but the question of the "extent" of jurisdiction was not decided.

3. Counsel supporting the complaint contend for concurrent jurisdiction nation-wide, notwithstanding the McCarran Act. The contention is that Congress did not intend thereby to delegate its jurisdiction over interstate commerce to the states, that at most it gave the states concurrent jurisdiction within their borders over the same acts and practices, that the states cannot "effectively" regulate such

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[1] Sec. 5 of the McCarran Act defines the District of Columbia as a state.

[fol. 286] acts. The logical end-result of this contention, of course, is that if every state had enacted the "Model Code," so that there was not a square yard of territory under such state law and, therefore, no "extent that such business is not regulated by state law," that nevertheless, there is Federal Jurisdiction. Another effect of this contention would necessarily be, that if the insurance commissioner of Pennsylvania, after summons and hearing, acting under Pennsylvania's Model Code, decides that respondent's representations are not false or misleading, nevertheless, the Federal Trade Commission, the next day, could decide that it was. This flies in the very teeth of the McCarran Act's prohibition that "no act of Congress shall be construed to invalidate, impair or *supersede* any law enacted by any state, etc." How it can be contended that such action under the Federal Trade Commission Act does not invalidate, impair or supersede the action under the state law is not made clear.

4. Reams of disquisition have appeared in the public print—law journals, reviews and trade magazines, briefs in other companion cases, as well as the briefs in this case—on this jurisdictional bone of contention. Even to summarize such a flood, would only proliferate beyond patience to peripateticism. Suffice it to say, that Public Law 15, particularly Sections 1 and 2(a), its legislative history, its announced and obvious intent, the language used by the Supreme Court in construing it in Prudential Insurance Company vs Benjamin 328 U.S. 408, 420-1, 429-30, convince [fol. 287] the Hearing Examiner that the intent of Congress in enacting it was to give to the states, if they chose to exercise it, full regulation of the insurance business in all its phases, except where such state regulation was as a matter of law, impossible or clearly ineffective, such as the situation reflected in U. S. vs. Sylvanus 192 F 2d 96—state law being obviously incapable of control over the United States mails. The Hearing Examiner is also of the opinion that the provisio in Section 2(b) of Public Law 15 was intended only to prevent a vacuum—that is, to provide Federal regulation where no state regulation had been enacted.

5. Applied then, to the case at bar, this means that the Federal Trade Commission has jurisdiction and power to stop respondent from disseminating by mail the something

less than five percent of its business directly to prospects, the representations hereinabove found to be deceptive and misleading, and likewise has jurisdiction and the power to stop respondent from transmitting to its local agents in Mississippi, Rhode Island, Missouri, Montana and the District of Columbia, for local dissemination, or use by them in those states, such misrepresentations, but that there is no jurisdiction over respondent's similar acts and practices with its agents in the other states of the Union.

6. The acts and practices of respondent, as hereinabove found, and as hereinabove limited, are to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, as that act is [fol. 288] applicable to respondent's business under the provisions of Public Law 15, 79th Congress.

ORDER

It Is Ordered that respondent National Casualty Company, a corporation, and its officers, agents, representatives and employees, directly, or through any corporate or other devise, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, and in Public Law 15, 79th Congress (15 U. S. C. A. 1011-5) of any accident, health, hospital or surgical insurance policy do forthwith cease and desist from disseminating by mail directly to the public, or disturbing to its agents located in Mississippi, Rhode Island, Montaina, Missouri or the District of Columbia any circular, announcement, mail card, advertising piece, or other printed material which represents, directly or by implication:

1. That any insurance policy may be continued in effect by the insured upon payment of stipulated premiums, indefinitely or for any stated period of time unless any other provision or condition of termination contained in the policy appears therewith clearly conspicuously, coincidentally and contiguously.
2. That no medical examination is required, unless there appears therewith coincidentally, contiguously, clearly and conspicuously all policy provisions

and conditions under which such medical examination may be required.

[fol. 289] 3. The extent or duration of either coverage or benefits payable, unless all exceptions, exclusions, limitations or provisos relating thereto, contained in the policy, clearly, conspicuously, coincidentally and contiguously, appear therewith.

(s) Frank Hier, (t) Frank Hier, Hearing Examiner.

December 6, 1955.

[fol. 290] BEFORE THE FEDERAL TRADE COMMISSION

NOTICE BY RESPONDENT OF INTENTION TO APPEAL THE HEARING EXAMINER'S INITIAL DECISION—Filed December 27, 1955

Now comes John F. Langs, attorney for the respondent, National Casualty Company, and hereby gives notice of intention to appeal the Hearing Examiner's initial decision filed December 8, 1955, in the above-entitled proceeding.

Respectfully submitted, National Casualty Company, By (s) John F. Langs, Attorney for Respondent, 2504-16 Guardian Building, Detroit 26, Michigan, WOodward 2-9460.

Date: December 24, 1955.

[fol. 291] BEFORE THE FEDERAL TRADE COMMISSION

NOTICE BY FEDERAL TRADE COMMISSION OF INTENTION TO APPEAL THE HEARING EXAMINER'S INITIAL DECISION — Dated December 19, 1955

Come now counsel in support of the complaint and hereby give notice of intention to appeal the hearing examiner's initial decision filed December 8, 1955, in the above-entitled proceeding.

Respectfully submitted, John W. Brookfield, Jr., Donald K. King, Counsel Supporting the Complaint.

Dated this 19th day of December, A. D. 1955.

[fol. 292] BEFORE THE FEDERAL TRADE COMMISSION

OPINION OF THE COMMISSION—May 21, 1956

By Secrest, Commissioner:

This is a proceeding in which the respondent was charged with having misrepresented the coverage and benefits afforded by its health and accident insurance policies. After appropriate hearings, during which evidence in support of and in opposition to the charges was received and a number of motions to dismiss the complaint were denied, the hearing examiner filed his initial decision from which both counsel in support of the complaint and the respondent have appealed. Presented for review are the examiner's findings and conclusions both as to the extent of the Commission's jurisdiction over the respondent's advertising practices and as to the tendency and capacity of the representations involved to mislead and deceive.

The respondent, a Michigan corporation, is licensed to sell, and does sell, its health and accident insurance policies in all of the states of the United States and in the District of Columbia and Hawaii. It carries on its business through an agency system composed of some 350 to 400 agencies located in each of the several states, and the respondent prepares and sends to its agents, for dissemination to prospects, advertising material in the form of direct mail cards, stuffers, lead sheets, form letters, applications with tear sheets and "rowaways. In addition, and at the request of its agents, the respondent disseminates something less than five percent of its direct mail advertising directly from its own offices in Detroit to members of the public located throughout the country. As a [fol. 293] general rule, the company issues its policies from its home office after receipt of signed applications therefor which have been obtained and forwarded to it by the agents, and the policies, when issued, are mailed to the agents for delivery to the purchasers.

For the purpose of inducing the purchase of its insurance policies, the respondent, in the manner indicated, has made numerous statements and representations with respect to the coverage and benefits provided by the policies. The complaint alleged that certain of these were false and

deceptive and that the dissemination thereof constituted a violation of the Federal Trade Commission Act. Grouping the challenged representations into five categories, the examiner found that those in four of the categories were deceptive and misleading, while those in the fifth were not. He held further, however, that the Commissioner's jurisdiction extends only to the respondent's advertising disseminated by direct mail and to its transactions in Mississippi, Rhode Island, Missouri, Montana and the District of Columbia, and he restricted the operation of the order to cease and desist contained in his initial decision accordingly.

The basis of the hearing examiner's conclusion as to the Commission's limited jurisdiction is that Congress, in enacting the McCarran-Ferguson Act (Public Law 15, 79th Congress, 15 U. S. C. A. § 1011-15), gave to the states, if they chose to exercise it, full regulation of the insurance business in all its phases (except where such state regulation is, as a matter of law, impossible or clearly ineffective, such as control over the United States mails), and that each of the states other than those named fully regulates the business of insurance by legislative enactment, with the [fol. 294] result that as to transactions in such states the Commission's jurisdiction has been withdrawn. On this question the Commission, on April 24, 1956, fully expressed itself in its decision in the matter of *The American Hospital and Life Insurance Company*, Docket No. 6237. The views there stated are equally applicable here, and for the reasons set forth in that decision the examiner's conclusions in this case on the jurisdictional question are rejected.

This leaves for consideration the examiner's decision on the merits. As stated in the initial decision, the respondent's advertising representations which were alleged to have been false and deceptive had to do with continuation of the policies, physical condition of the insureds, extent of coverage, dollar amounts payable for operations, and time periods for which monthly payments could be expected. As to all except those dealing with dollar amounts payable for operations, the examiner held that the representations have been misleading and deceptive. With re-

spect to the representations concerning dollar amounts payable for operations, his holding was otherwise.

Contending that its advertising statements, when read in context, are literally true and, further, that evidence of actual deception is lacking, the respondent in support of its appeal relies principally on the arguments (1) that the questioned advertising was disseminated almost exclusively in states having laws regulating the business of insurance and (2) that the use of certain of the other material has been abandoned pursuant to a code of advertising ethics adopted by the Health and Accident Underwriters Conference, of which the respondent is a member, rendering [fol. 295] the issuance of an order to cease and desist unnecessary.

The hearing examiner's conclusions that the respondent's claims and representations are misleading and likely to be deceptive are not seriously contested. The fact that certain of the statements, when considered alone, may be true, is no justification for their use where the over-all impression created thereby is false. *P. Lorillard Company v. Federal Trade Commission*, 186 F. 2d 52 (C. A. 4, 1950). As said by the Supreme Court in *Donaldson, Postmaster General v. Read Magazine, Inc., et al.*, 333 U. S. 178, 188 (1948):

> "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposely printed in such a way as to mislead."

Nor is it necessary that actual deception be proved or found in a proceeding under Section 5 of the Federal Trade Commission Act. A showing that the advertisements in question have a tendency or capacity to deceive is all that is required. *Progress Tailoring Co., et al. v. Federal Trade Commission*, 153 F. 2d 103 (C. A. 7, 1946). And this, we think, the examiner correctly found to be the case.

In its decision in the matter of The American Hospital and Life Insurance Company, the results of which are applicable here, the Commission held that the respondent's advertising representations disseminated in interstate

commerce are subject to the Commission's jurisdiction regardless of the existence of state regulations covering the intrastate dissemination of the same material. The fact [fol. 296] that the respondent, prepared, assembled and mailed to its agents in the various states, for local distribution, advertising material containing all of the statements alleged to have been false is undenied, and there can be no doubt that by so doing the respondent was engaging in an interstate commercial activity. In the view the Commission takes of its jurisdiction, the further fact that some of the representations may not have been made in states not having regulatory statutes is wholly immaterial, and the respondent's argument on this point is accordingly rejected.

The contention that the proceeding is moot and devoid of public interest because of discontinuance of use of certain of the representations is likewise without merit. As pointed out by the examiner, dismissal of a proceeding on the ground of discontinuance is discretionary with the Commission. In the exercise of its discretion, the Commission must necessarily consider, among other things, whether there is a likelihood that the practice found to have been unlawful will be resumed in the absence of an order prohibiting it—and this, in turn, is governed by "all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts." *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 330 (C. A. 7, 1944), cert, denied 323 U. S. 730. The record discloses that of the 45 separate pieces of advertising material introduced into evidence, containing statements of the kind alleged in the complaint to have been deceptive, 28 were still being used as of the date the complaint was issued. Moreover, it has been the respondent's contention throughout this proceeding that its [fol. 297] advertising, including advertising it no longer uses, has not been deceptive or in any manner unlawful; and the respondent has offered no assurances of any kind that it will not resume the use of all of the questioned representations once this proceeding is disposed of. The respondent's argument that "The strongest assurance and purchasing public can have that it will be treated fairly

will be found in an aware dedication of a company to its public responsibility" is not convincing in the light of the numerous claims which have been found on this record to have been false and deceptive, and the Commission is in full agreement with the examiner that the public interest requires the issuance of an appropriate order to cease and desist under these facts.

In paragraphs 19 to 22, inclusive, of the initial decision, the examiner discusses the respondent's advertising statements with respect to the dollar amounts payable to its policyholders for losses due to operations. These statements, the complaint alleged, and counsel in support of the complaint now contends, are false and deceptive because they represent, contrary to fact, that the policies provide indemnification for each and every operation up to an amount of $300. The examiner, however, being of the opinion that the contended for impressions are "far-fetched" and "not reasonably to be expected," read the statements as meaning that some, but not necessarily all, of the insured's surgical expenses will be paid on a sliding scale or schedule ranging from $5.00 to $300.00, and accordingly found that the statements accurately reflect the coverage provided by the policies. The question for determination now is which of these conflicting points of view is more nearly correct.

[fol. 298] The respondent's advertising statements of financial benefits payable under its policies for losses due to operations are as follows:

> "Surgical Operations, whether performed in or out of the hospital, are paid up to $300.00 in Addition to Hospital Benefits. Full benefits are paid to all insured members of the family group."
>
> "Surgery Bills from $5.00 to $300.00 for sickness or accident."
>
> "Pays surgical operation expense up to $300.00."
>
> "Surgical plan—to $300.00."
>
> "Three choices of surgical operation benefits $5.00 to $150.00, $7.50 to $225.00, $10.00 to $300.00."
>
> "Your Doctor Bills Paid at Home, at Hospital, at Your Doctor's Office."

"$10 to $300 Available Surgical Operation Fees."

"Pays surgical operation fees up to $150.00."

"Who Pays These Bills? You Should Be Fully Protected against All These Expenses. * * * Never Before Has Such Protection Been Offered."

The policies to which these statements refer clearly do not provide for payments up to $300 for every operation, but have attached to them riders containing schedules of various amounts payable for specified types of operations (at least two of the policies have the schedules included in the policies themselves). The number of operations covered by the schedules varies from forty-seven in the case of one to ninety in the case of two others, and the number for which the maximum amount of $150 or $300 is payable (depending on the amount of premium paid) varies from two in some instances to six in some of the others, with [fol. 299] the operations for which payments of $25.00 or less are provided running from 21 to 43. In the case of a tonsillectomy or adenoidectomy, the typical allowance under the schedules is $25.00, and even this amount is not paid, nor will payment be made for an appendectomy, herniotomy, hemorrhoidectomy, or operations for any injury or disease of the female generative organs, unless the rider shall have been in force for not less than six months from date of issue.

In considering a similar situation in *The American Hospital and Life Insurance Company* case, we said:

> "Appraising this advertisement as it is likely to be read by unsuspecting, incautious members of the purchasing public, we gain the impression that the policy will indemnify up to a maximum sum of $150 for any surgical operation serious enough to cost such an amount. Thus, if a tonsillectomy cost $50, we would think it reasonable to expect that one insured by the policy would be protected to that extent. The advertisement is therefore deceptive and misleading in that it promises benefits which the policy does not corroborate."

Our conclusion is no different here. As the courts have uniformly recognized, it is not the trained and experienced

experts who need protection, but the members of the buying public who, in making purchases, are governed largely by appearances and general impressions. Furthermore, the ultimate impression upon the mind of a reader arises from the sum total of not only what is said in an advertisement but also of all that is reasonably implied. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (C.A. 2, 1944). And it seems obvious to u that the statements referred to, especially when read in conjunction with such superlatives as "The Most Complete Coverage," "Complete Protection," "All Inclusive Hospital—Surgical—Nurse Protection," and "Maximum Pro-[fol. 300] tection at Moderate Cost," which have also appeared in the respondent's advertisements, are almost certain to mislead readers into thinking they are getting protection which the policies do not provide. The respondent's practice of describing in its advertising the maximum benefits that may be received under the policies without disclosing the schedule of payments for which the policies actually provide is thus unfair and deceptive within the meaning of the Federal Trade Commission Act.

The appeal of counsel supporting the complaint is granted, the appeal of respondent is denied, and the initial decision will be modified in conformity with this opinion.

Commissioners Gwynne and Mason dissented.

May 21, 1956.

[fol. 301] BEFORE THE FEDERAL TRADE COMMISSION

FINAL ORDER—Issued May 21, 1956

Counsel in support of the complaint and respondent, National Casualty Company, having respectively filed their cross-appeals from the initial decision of the hearing examiner in this proceeding, and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision granting the appeal of counsel in support of the complaint and denying the appeal of respondent and directing modification of the initial decision in conformity with the Commission's opinion;

It Is Ordered that the following paragraphs be, and they hereby are, substituted for paragraphs 20 to 22, inclusive,

of the findings as to the facts contained in the initial decision:

"20. Through such statemen' , respondent has represented, among other things, that the policies to which they refer provide indemnity up to a maximum sum of $300 for any operation serious enough to cost such an amount.

"Respondent's policies do not so provide. Under the terms of the policies, payments on account of surgical operations are in accordance with a schedule of fixed fees for different types of operations. Of the numerous operations listed, varying with the different policies from forty-seven to ninety, only a very small number (ranging from two to six on the different schedules) call for payments of as much as $150 or $300 (depending on the amount of premium paid). By way of contrast, the operations for which payments of $25.00 or less are provided, regardless of the actual cost to the [fol. 302] policy holder, range from twenty-one in the case of one of the schedules to forty-three in the case of another. Furthermore, according to the terms of the policies, no payments will be made for tonsillectomy, adenoidectomy, appendectomy, herniotomy, hemorrhoidectomy, or for operations for any injury or disease of the female generative organs unless the policy shall have been in force for not less than six months from date of issue. None of these limitations or conditions is disclosed in the advertising.

"21. Most of the representations set out in paragraph 19 were distributed in all states; others only in some states.

"22. Respondent's representations referred to in paragraphs 19 and 20 have the tendency and capacity to mislead and deceive, and, in the absence of an accompanying schedule clearly disclosing the payments for which the policies provide, are false and deceptive."

It Is Further Ordered that the following paragraphs be, and they hereby are, substituted for the conclusions of law included in said initial decision:

"1. The Federal Trade Commission has jurisdiction over all of the respondent's acts and practices alleged in the complaint to be unlawful.

"2. The public interest in the proceeding is clear and substantial.

[fol. 303] "3. The use by respondent of the statements and representations, found herein to be false and deceptive, with respect to the terms and conditions of its policies of insurance, and its failure to reveal the limitations of the coverage of said policies, have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce the purchase of said policies of insurance because of such erroneous and mistaken belief.

"4. The aforesaid acts or practices of respondent as above set forth are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act."

It Is Further Ordered that the following order be, and it hereby is, substituted for the order contained in said initial decision:

"It Is Ordered that respondent, National Casualty Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from representing, directly or by implication:

"1. That any such policy may be continued in effect by the insured upon payment of stipulated premiums, [fol. 304] indefinitely or for any stated time, unless full disclosure of any other provision or condition of termination contained in the policy is made conspicuously, prominently, and in sufficiently close conjunction with the representation as will fully relieve it of all capacity to deceive.

"2. That no medical examination is required, unless the respondent actually insures the policyholder without regard to his physical condition before or after is-

suance of the policy; or otherwise representing that the condition of the insured's health at the time of issuance of the policy will not be considered by the respondent in determining its liability thereunder, or that the respondent will not, as a claims practice, require proof of good health of the insured at the time of issuance of the policy.

"3. That any policy provides for payment in full or in any specified amount or for payment up to any specified amount for any medical, surgical or hospital service, unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented, or unless full disclosure of the schedule of payments for which the policy provides is made conspicuously, prominently, and in sufficiently close conjunction with said representation as will fully relieve it of all capacity to deceive.

"4. The extent or duration of either coverage or benefits payable under the terms of any policy, unless [fol. 305] a statement of all the conditions, exceptions, restrictions and limitations affecting the indemnification actually provided is set forth conspicuously, prominently, and in sufficiently close conjunction with the representation as will fully relieve it of all capacity to deceive.

"It Is Further Ordered that respondent, National Casualty Company, shall, within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied therewith."

It Is Further Ordered that the initial decision of the hearing examiner, as modified herein, is hereby adopted as the decision of the Commission.

By the Commission, Commissioners Gwynne and Mason dissenting.

(s) Robert M. Parrish, Secretary. [Seal.]

Issued: May 21, 1956.

[fol. 306] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION—Filed July 25, 1956

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

Your Petitioner, National Casualty Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal place of business located at Detroit, Michigan, respectfully presents its petition for a review of the Order of the Federal Trade Commission issued in the above entitled matter, Docket No. 6311, dated May 21, 1956 and served on Petitioner on May 31, 1956, wherein Petitioner was ordered to cease and desist from certain practices alleged and found to be in violation of the Federal Trade Commission Act (Title 15 U.S.C. §41, et seq.)

This petition for review is filed in this Court pursuant to Title 15 U.S.C. §45(c).

Petitioner, which is engaged in the business of selling accident and health insurance policies through an agency system composed of some 350 to 400 general agents or agencies located in each of the several States of the United States, printed certain advertising material, the majority of which was shipped by mail to its agents for dissemination to prospective customers and in addition about five percent was disseminated by direct mail from the home office to the public for and on behalf of its agents.

On March 11, 1955 the Federal Trade Commission issued its complaint in which Petitioner was charged with the dissemination of false and misleading advertising pertaining to its health and accident insurance policies in violation [fol. 307] of the Federal Trade Commission Act as limited by the McCarran Act which provides that the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law" (15 U.S.C. §1012).

Forty-five States, including the State of Michigan from which Petitioner received its charter, have enacted statutes regulating casualty insurance advertising.

Petitioner respectfully represents:

1. That there is no area in which Petitioner's insurance advertising practices are not regulated by State law and therefore, under the McCarran Act, the Federal Trade Commission was and is without jurisdiction to issue the complaint or the order against which this petition for review is directed, and the conclusion of the Federal Trade Commission as set forth in paragraph 1 of its Conclusions of Law as contained in its final Order that it has jurisdiction over all of the Petitioner's acts and practices alleged in the complaint to be unlawful is contrary to the law under the undisputed facts in this case.

2. That the findings and conclusions of the Federal Trade Commission that the advertising or representations of the Petitioner as referred to have the tendency and capacity to mislead and deceive or are deceptive, false or misleading or give the impression contrary to the provisions of the policies sold, as set forth in paragraphs 11, 14, 16, 18, 20, 22, 24 and 25 of the Initial Decision as amended and adopted in its final Order are not supported or based upon any substantial or credible evidence, have no foundation either in fact or in law and are wholly unwarranted under [fol. 308] the record in this case.

3. That the conclusions of the Federal Trade Commission as set forth in Paragraphs 2, 3 and 4 of its Conclusions of Law as contained in its final Order have no foundation either in fact or in law and are contrary to the evidence and wholly unwarranted under the record in this case.

4. That Petitioner will set out and elaborate in its Brief all of the points upon which it relies as provided under the Rules.

Wherefore, your Petitioner prays that the aforesaid Order of the Federal Trade Commission be review by this Honorable Court and that upon such review the said cease and desist order of the Federal Trade Commission entered in their Docket No. 6311 against Petitioner be set aside and held for naught. Petitioner prays for such other and further relief as to the Court may seem meet and just.

Langs, Molyneaux & Armstrong, By (s) John F. Langs, 2508 Guardian Building, Detroit 26, Michigan, Attorneys for Petitioner, National Casualty Company.

[fol. 309] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—February 18, 1957 (omitted in printing)

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—June 6, 1957

On petition to review an order of the Federal Trade Commission,

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On Consideration Whereof, It is now ordered, adjudged and decreed that the order of the Federal Trade Commission be and it is set aside and the case is remanded to the Federal Trade Commission for further proceedings consistent with the opinion herein.

[fol. 310] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL CASUALTY COMPANY, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent.

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

OPINION—June 6, 1957

Before: Simons, Chief Judge, Allen and Miller, Circuit Judges.

Miller, Circuit Judge. The petition seeks a review of an order of the Federal Trade Commission requiring the petitioner to cease and desist from engaging in acts and

practices in the conduct of its insurance business found by the Commission to be unfair and deceptive, in violation of the Federal Trade Commission Act, as amended. Sect. 45(a)(1)(6) and (c), Title 15, U.S. Code.

The complaint filed by the Commission alleged that the petitioner in the course of its interstate business of selling accident and health insurance and for the purpose of inducing purchases and such insurance policies, was making statements and representations concerning the benefits of said policies of insurance which were false and deceptive, were to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce v thin the meaning of the Federal Trade Commission Act. Petitioner by its answer admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading, or was to the prejudice and injury of the public, or that it had violated the Federal Trade Commission Act. The petitioner affirmatively alleged that the Commission was without jurisdiction over its interstate insurance business because of states statutes [fol. 311] regulating unfair and deceptive acts or practices within the respective boundaries of the states, within the scope and meaning of the McCarran Act, Sections 1011-1015, Title 15, U. S. Code.

At the hearings which followed, the facts were shown to be as follows. Petitioner is a stock company incorporated under the laws of Michigan for the purpose of selling accident, health and all types of casualty insurance, with its principal office in Detroit, Michigan. It is licensed to sell such policies in all states of the United States, the District of Columbia and Hawaii, throug resident agents located therein. It sells its insurance policies by solicitation from 350 to 400 direct, but independent, insurance agents throughout the nation, who operate under contract on commission only. Petitioner prepares and sends to these agents, direct-mailing cards, advertising material and applications. The agents mail locally or distribute personally this material to likely prospects, secure leads thereby and then call and personally solicit the prospect. A small percent of direct mail advertising is sent by petitioner from its offices in Detroit

to the public. 80% or more of petitioners' accident and health policies are issued by it from its home office after receipt, checking and consideration by it of the prospect's signed application which has been secured by the agent. Any policy issued by petitioner is forwarded to the agent for delivery to the insured. Premium notice forms are printed by the petitioner and furnished to the agents who mail them out locally. Premium collection is the agent's responsibility, only 5% or less being remitted directly to the petitioner in case of unusual or temporary situations.

The Hearing Examiner held that four of the five categories of advertising set forth in the complaint were unfair and deceptive as alleged. He held that the Commission's overall interstate jurisdiction was limited to the four states and the District of Columbia which had no statute regulating unfair or deceptive acts or practices in the business of insurance within their respective boundaries. He also held that the Commission had jurisdiction in all states over the advertising practices of petitioner to the extent that its deceptive advertising material was disseminated by the petitioner by the use of the United States mails. He issued a Cease and Desist order to that effect.

Upon appeal, the Commission reversed the Examiner in part, holding by a three-to-two decision that it had full jurisdiction over the interstate sale of insurance by [fol. 312] means of unfair and deceptive advertising practices, irrespective of whether the state had adopted a local law regulating such practices within its boundaries. Since, in our opinion, this case will be disposed of one the jurisdictional issue, it is unnecessary to discuss petitioner's contentions that its advertising was not false or misleading and that the proceeding and the issuance of a Cease and Desist order did not serve any public interest. The jurisdictional question involves the construction and application of the McCarran Act referred to above

The background giving rise to the McCarran Act is important.

In 1869, the Supreme Court upheld the validity of a Virginia statute which regulated foreign insurance companies, on the ground that the statute did not offend the Commerce Clause of the U. S. Constitution because "issuing a policy

of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 8 Wall. 168, 183. Thereafter, in similar cases, the Supreme Court consistently ruled that the business of insurance was not commerce. In *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, 503-504, 510, the Supreme Court, as late as 1913, held to this view, stating in its opinion in that case that "contracts of insurance are not commerce at all, neither state nor interstate." However, in 1944, the Supreme Court in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, a case involving alleged violations of the Sherman Anti-Trust Act, again considered the question and in a four-to-three decision, held that the business of insurance conducted across state lines was interstate commerce subject to regulation by Congress under the Commerce Clause.

The Supreme Court's decision was vigorously protested in the insurance field. The insurance companies, relying upon the court's previous rulings, had engaged in practices which were prohibited under the federal anti-trust laws but which were permitted under the laws and regulations of the various states. The states feared the loss of large revenues under their laws taxing insurance sold within the states, which, under the new ruling, might be held discriminatory of interstate commerce and, therefore, unconstitutional. As a result of this vigorous reaction to the decision, Congress passed the so-called McCarran Act in 1945. This Act provides in part as follows:

"*Sec. 1.* Congress declares that the continued regulation and taxation by the several States of the business [fol. 313] of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"*Sec. 2.* (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the busines of insurance: *Provided*, That

after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"*Sec. 3.* (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof. (b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement, to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"*Sec. 4.* Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1955, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920."

The petitioner contends that the purpose of the Act was generally to restore the insurance business to the situation existing prior to the decision in the *South-Eastern Underwriters* case, and that in states in which the insurance business was regulated by state law, such business was not subject to regulation by the Federal Trade Commission. [fol. 314] The Commission does not challenge the validity of any state statute regulating the business of insurance, nor the validity of the McCarran Act. It points out that state laws have no extra-territorial effect and cannot regulate the business of insurance beyond the borders of the particular state; that prior to the *South-Eastern Underwriters Association* case, the states were authorized to regulate the intrastate aspects of the insurance business, even though state regulation might affect interstate com-

merce in insurance; that following the decision in the *South-Eastern Underwriters Association* case there was a field of interstate business of insurance which the states could not regulate and which Congress did not intend to leave unregulated; that in enacting the McCarran Act, Congress intended only to authorize the states to exercise their police power in the same manner they had exercised it when the business of insurance was not considered to be commerce, and gave the states until January 1, 1948, later extended by statute to June 30, 1948, in which to define a reasonable area of state police power, beyond which they could not go; that after that date the Commission was authorized to regulate insurance on different grounds, namely, regulating the use of the interstate channels of commerce; and that the Federal and state laws in the field of insurance supplement and reinforce one another in order to provide full protection to the public.

The wording of the Act clearly indicates that, regardless of the ruling in the *South-Eastern Underwriters Association* case, Congress did not intend to take from the states the regulation of insurance within the state. Section 1 declares that "the *continued* regulation . . . by the several states of the business of insurance is in the public interest, . . ." (emphasis added). Section 2 states, "The business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business." The real question is, to what extent, if any, did Congress provide for federal regulation in addition to state regulation.

The Act is equally clear, by the express wording of Section 3, that until January 1, 1948, subsequently extended by amendment to June 30, 1948, the business of insurance was not subject to the Federal Trade Commission Act or certain other federal regulatory acts. After January 1, 1948, according to Section 2 of the Act, the Federal Trade Commission Act and the Sherman and Clayton Acts were made "applicable to the business of insurance to the extent that such business is not regulated by state law." That is the only express grant of power to the Fed- [fol. 315] eral Trade Commission over the business of insurance contained in the Act. It is a grant expressly limited by its terms to insurance business which "is not regulated

by state law." We do not find in those words the "clear and specific grant of jurisdiction" to the Federal Trade Commission which the Commisison claims is given to it by the Act. On the contrary, we find the logical and reasonable conclusion from the two sections to be that jurisdiction over the business of insurance was granted to the Federal Trade Commission after January 1, 1948, *only* where the business was not regulated by state law.

There is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation. But it does not follow that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be. Congress realized that by reason of the Supreme Court decision federal jurisdiction existed over the interstate business of insurance. The enactment of the McCarran Act was to correct that situation. It expressly prohibited the exercise of such jurisdiction for a period of approximately three years. After that period it made a restrictive grant of jurisdiction. In order to sustain the contention of the Commission, we must imply a broader grant of jurisdiction to the Commission after the three-year period than is contained in the express words of the Act. We do not believe that Congress would leave to implication such an important segment of the overall question of jurisdiction which it was dealing with, when it could easily have been provided for by express words. A construction of the Act does not sustain the contention.

Section 4 of the Act provides that nothing contained in the Act shall be construed to affect the application to the business of insurance of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act. If it was intended by the Act to retain in or give to the agencies of the Federal Goverment jurisdiction over insurance companies engaged in interstate commerce, irrespective of its regulation by state law, this section of the Act was unnecessary and meaningless since the acts referred to would be applicable by reason of the Supreme Court's decision without the provisions of Section 4.

It is probable that in the regulation of the business of insurance by both the federal and state governments there

[fol. 316] will develop a conflict of policies. The parties agree that in such event the federal regulation would control. If so, "the continued regulation and taxation by the several states," referred to in Section 1 of the Act as being in the public interest, would no longer exist.

The general purpose of restoring to the states the right to regulate the business of insurance as it existed prior to the 1944 decision was carried out by the moratorium provided by the Act until January 1, 1948. During the moratorium there was no jurisdiction over the business of insurance in the Commission. During that period the states which did not have such laws had the necessary time in which to pass regulatory legislation. The tie-in between the moratorium and the obvious invitation to enact regulatory legislation while it existed, both recognized the need of regulating the business of insurance and indicated an intention to permit the states to do it to the exclusion of the federal government if they elected to do so. It seems more logical to conclude that it was the purpose of the moratorium to deprive the federal agencies of their newly acquired jurisdiction over the business of insurance in order to restore such jurisdiction to the states if they elected to assume it, than to conclude that it was the purpose of the moratorium to deprive the agencies of their newly acquired jurisdiction for only a short period of time after which it would be given back to them regardless of what the states did on the mean time.

This construction of the Act is in accord with statements by Senator McCarran on the floor of the Senate on February 26 and 27, 1945, in connection with the Senate's consideration of the Conference Report on S. 340. Senator McCarran stated: "The moratorium would not be continued, but if in the meantime the states themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective." He also said: "During the 3-year moratorium the states may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate, they will have taken the business of insurance out from under the Sherman Anti-Trust Act, the Clayton Act, and

the other acts. If during the moratorium the states do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable." 91 Cong. Rec. 1441-1444.

[fol. 317] The Supreme Court, since the passage of the Act, has expressed similar views. In *Prudential Insurance Co.* v. *Benjamin*, 328 U.S., 408, 429-431, the court said: "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." It referred to the nation-wide existence of state systems of regulation and taxation and to the great difference in scope and character of the regulations imposed and of the taxes exacted. It then said: "Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." Continuing with the discussion, it later said, ". . . it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." In a later case, *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409-413, the court said: "Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this court's decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, might be found to have on state regulation of insurance." In *Wilburn Boat Co.* v. *Fireman's Insurance Co.*, 348 U.S. 310, 319, the court in reviewing the enactment of the McCarran Act said: "Passage of the bill followed *United States* v. *South-Eastern Underwriters Assn.*, *supra*, holding that, despite the constitutional doctrine embodied in the *Paul* v. *Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *South-Eastern* case, however, all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter, known

as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue."

In making its ruling the Commission followed its prior ruling in *The American Hospital and Life Insurance Company* case, which at that time had not been reviewed by the Court of Appeals. On April 9, 1957, following the argument on appeal and submission of the present case, the Court of Appeals for the Fifth Circuit handed down its opinion on its review holding that the Commission was without jurisdiction in the matter and setting [fol. 318] aside the Cease-and-Desist Order in that case. *The American Hospital and Life Insurance Co.* v. *Federal Trade Commission*, . . . F. (2d) . . ., C.A. 5th. We agree with the ruling of the Court of Appeals in that case.

We are of the opinion that the Federal Trade Commission was without jurisdiction to regulate the insurance business of the petitioner in those states where such business is regulated by state law. The order of the Commission is set aside and the case remanded to the Commission for further proceedings consistent with this opinion.

[fol. 319] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 320] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6, 1957.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 23d day of August, 1957.

[fol. 321] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION, Petitioner,

vs.

NATIONAL CASUALTY COMPANY

ORDER ALLOWING CERTIORARI—November 12, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is consolidated with No. 436 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 484124

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 436

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1957

CERTIORARI GRANTED NOVEMBER 12, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 436

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16,132.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY,

versus

FEDERAL TRADE COMMISSION.

PETITIONER'S DESIGNATION AS TO PRINTING RECORD—Filed September 9, 1956

1. Complaint.

2. Plea to the jurisdiction and answer of The American Hospital and Life Insurance Company, which was transmitted to the commission for filing on November 8, 1954, and which must have been filed shortly thereafter.

3. Motion to dismiss No. 2 filed by The American Hospital and Life Insurance Company with Hearing Examiner July 9, 1955.

4. Motion to dismiss No. 3 filed by The American Hospital and Life Insurance Company with Hearing Examiner July 9, 1955.

5. Initial Decision by J. Earl Cox, Hearing Examiner, filed December 8, 1955.

[fol. 2] 6. Findings as to Facts, Conclusions and Order by the Commission, issued April 24, 1956.

7. Opinion of the Commission dated April 24, 1956.

8. Joint dissenting opinion of Chairman Gwynne and Commissioner Mason, dated April 24, 1956.

9. Additional views of Commissioner Mason dated April 24, 1956.

The American Hospital and Life Insurance Company,
By J. D. Wheeler, General Counsel.

[fol. 3] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION—Filed May 30, 1936

To the Honourable Judges of the United States Court of Appeals for the Fifth Circuit:

Your Petitioner, The American Hospital and Life Insurance Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at San Antonio, Texas, respectfully presents its petition for a review of the Order of the Federal Trade Commission bearing date of April 24, 1956, Docket No. 6237, wherein Petitioner was ordered to cease and desist from certain practices allegedly in violation of the Federal Trade [fol. 4] Commission Act of 1914 as amended. (Title 15, U.S.C.A., Sec. 42, et seq.) This petition is filed in this Court pursuant to Section 5(c), Title 15, U.S.C.A., Section 45(c).

The Order above referred to is attached to and made a part of the so-called Findings as to the Facts and Conclusions to the effect that the Federal Trade Commission has jurisdiction over all of Petitioner's acts and practices alleged in the Complaint to be unlawful, and that the acts and practices of Petitioner are to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act.

Petitioner respectfully represents:

1. That the Federal Trade Commission had no jurisdiction to file the Complaint here involved or to enter the Order complained of and that all of the acts and actions of the Federal Trade Commission in this regard and all of the orders entered by it, including the final order against which this petition for review is directed, are wholly outside of the jurisdiction of the Federal Trade Commission and that the Federal Trade Commission has no jurisdiction of the subject matter hereof because by the Act of Congress of March 9, 1945, Chapter 20, Sections 1 to 5, both inclusive, 59 Stat. 33 and 34 as amended by Act of July

25, 1947, Chapter 326, 61 Stat. 448, now carried in the United States Code Annotated, Title 15, Sections 1011 to 1015, both inclusive, known as the McCarran Act, Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not [fol. 5] be consfrued to impose any barrier to the regulation or taxation of such business by the several states; and provided further that the business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business; and provided further that no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance with the proviso that after June 30, 1948, the Act of September 26, 1914, known as the Federal Trade Commission Act as amended shall be applicable to the business of insurance to the extent that such business is not regulated by State law. That in all of the States in which Petitioner transacts the business of insurance such insurance business is adequately and effectively regulated by State law.

2. Finding of Fact No. 7, as set out on page 4 of the Findings as to the Facts, Conclusions and Order, is not supported or based upon any substantial or credible evidence and is contrary to the undisputed evidence in this record.

3. Finding of Fact No. 8, as set out on pages 4 and 5 of the Findings as to the Facts, Conclusions and Order, is not supported or based upon any substantial or credible evidence and is contrary to the undisputed evidence in this record.

4. Finding of Fact No. 9, as set out on pages 5 and 6 of the Findings as to the Facts, Conclusions and Order, [fol. 6] is not supported or based upon any substantial or credible evidence and is contrary to the undisputed evidence in this record.

5. That the Federal Trade Commission's Conclusion No. 1, set out on page 6 of the Findings as to the Facts, Conclusions and Order, has no foundation in fact or law, the

Federal Trade Commission having no jurisdiction of the subject matter of the Complaint.

6. That Petitioner not having disseminated any false or deceptive matter no public interest is involved in this proceeding as asserted in Conclusion No. 2 set out on page 6 of the Findings as to the Facts, Conclusions and Order.

7. That Conclusion No. 3, set out on page 6 of the Findings as to the Facts, Conclusions and Order, has no foundation either in fact or in law and is wholly unwarranted under the record in this case.

8. That Conclusion No. 4, set out on page 6 of the Findings as to the Facts, Conclusions and Order, has no foundation either in fact or in law and is wholly unwarranted under the record in this case.

9. That Petitioner will set out in its brief to be filed in the United States Court of Appeals for the Fifth Circuit as provided by the Rules, all of the points upon which it relies.

Wherefore, your Petitioner prays that the aforesaid Order of the Federal Trade Commission be reviewed by this Honorable Court and that upon such review the said cease and desist order of the Federal Trade Commission [fol. 7] entered in their Docket No. 6237 against Petitioner be set aside and held for naught. Petitioner prays for such other and further relief as to the Court may seem meet and just.

The American Hospital and Life Insurance Company,
By S. E. McClellan, President, J. D. Wheeler,
Counsel for Petitioner.

Of Counsel: Boyle, Wheeler, Gresham, David & Gregory, 1603 Alamo National Building, San Antonio 5, Texas.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ORDER TO FILE PETITION—May 30, 1956

A petition for review of an Order of the Federal Trade Commission of April 24, 1956, Docket No. 6237, having been presented to this Court;

[fol. 8] It Is Ordered that said petition be filed and docketed as of May 30, 1956;

And it is further ordered that a copy of this order and said Petition be forthwith served upon the Federal Trade Commission, and that said Federal Trade Commission, upon service of such copies, forthwith certify and file in this Court, a transcript of the entire record in the proceedings, in conformity to Rule 38 of this Court.

(S.) John A. Feehan, Jr., Clerk of the United States Court of Appeals for the Fifth Circuit.

New Orleans, Louisiana, May 30, 1956.

BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, a Corporation

Docket No. 6237.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of [fol. 9] insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The American Hospital and Life Insurance Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent, The American Hospital and Life Insurance Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at Pecan & St. Mary's Streets in the City of San Antonio, Texas.

Paragraph Two. Respondent is now, and for more than two years last past has been, engaged as an insurer in the business of insurance in commerce, as "commerce" is defined in the Federal Trade Commission Act, by entering into insurance contracts with insureds located in various States of the United States other than the State of Texas, in which states the business of insurance is not regulated by state law to the extent of regulating the practices of respondent alleged in this complaint to be illegal. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said insurance policies in commerce between and among the several States of the United States.

[fol. 10] Respondent during the two years last past has sold insurance indemnification provided in a variety of policies, among which are the following:

(1) American Family Accident Policy, identified by respondent as form A(1)-7-53.
(2) American Standard Accident Policy, identified by respondent as form ASA(1-50).
(3) All American Accident Policy, identified by respondent as AAA(1-50).
(4) Income Protection Policy, identified by respondent as form A&H3-1949.
(5) Business and Professional Men and Women's Income Policy, identified by respondent as form BPI.
(6) Preferred Individual Hospital and Surgical Insurance Policy, identified by respondent as form PRI-12.
(7) American Economy Hospital and Surgical Insurance Policy, identified by respondent as form AE Rev.
(8) All American Automobile Accident Policy, identified by respondent as form AAAA.

Paragraph Three: Respondent is licensed, as provided by the respective state laws to engage in the business of insurance as heretofore generally described in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kentucky, [fol. 11] Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee and Texas. Respondent is not now, and for more than two years last past has not been, licensed as provided by the respective state laws to engage

in the business of insurance in any state of the United States other than those above mentioned.

Respondent has sold a substantial number of its said policies to insureds now residing in states other than those in which respondent has been duly licensed, as aforesaid, and respondent mails to such insureds or policyholders notices and receipts relating to the payment of renewal premiums and receives and accepts from such insureds or policyholders premiums mailed to it renewing the coverage purchased for the period of time covered by the premium submitted. The renewal of term insurance in this manner constitutes trade in commerce to the same extent as the original purchase of said insurance.

Paragraph Four: In the course and conduct of its aforesaid business, respondent, during the two years last past, disseminated and caused to be disseminated in the form of circulars and other printed and written matter, false, misleading and deceptive advertisements concerning the terms and provisions of various of its policies of insurance. These advertisements were disseminated by the United States mails, or through the licensed agents of respondent, in commerce between and among the various states of the United States. The purpose and effect of these advertisements was, and is, to induce members of the public to become insured by the respondent under the terms and provisions of the policies advertised.

[fol. 12] Paragraph Five: In the course and conduct of its said business in commerce, as aforesaid, the respondent has disseminated, among others of similar import and meaning, not herein set out, advertisements relating to its said policies containing statements hereinafter set forth, as follows:

1. "No Age Provision terminating or reducing benefits because of increasing age."

"Issued to Men, Women, and Children, Ages 3-60."

"Issued to Men and Women, ages 18 to 60."

2. Confining Illness Indemnity for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. . ."

3. "It Will Pay. . . Medical Costs for Accidents"

Pays You A Monthly Income when you are disabled because of accident • • • "

"Covers Accidents"

"Pays from First Day of disability for each accident . . . "

"Monthly Indemnity for Loss of Time by Accidents"

4. "Surgery From $3.00 to $150.00 Depending on seriousness of operation."

5. "Room Service
Hospital Expense
Surgery
Additional Benefits
Maternity . . ."

Paragraph Six: Through the use of said statements and representations, and others of similar import and [fol. 13] meaning, not specifically set out herein, respondent represents and has represented, directly or by implication, with respect to said policies:

1. That the indemnification provided by respondent's policies may be continued to age 60 or for an indefinite period at the option of the insured.

2. That respondent's policies provide indemnification for any or all sickness or illness.

3. That respondent's policies provide indemnification for all or any accidents.

4. That policy AE Rev. 9-52, the policy referred to by the representation set out in subparagraph 4 of Paragraph Five, provides for the payment of $150.00 for any operation serious enough to justify such a surgeon's fee.

5. That policy AE Rev. 9-52, the policy referred to, provides for the payment of maternity benefits in addition to payments for room service and hospital expense.

Paragraph Seven: The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Respondent's policies are term policies and are renewable at the option of the respondent only. Further, the policy is automatically terminated upon the payment of certain cash benefits.

2. Respondent's policies do not provide indemnification [fol. 14] for each, any, or all sickness; on the contrary, the policies which provide indemnification in the form of

a monthly confining sickness benefit limit such indemnification for sickness which shall wholly, necessarily and continuously disable and prevent the insured from engaging in any business, profession, or employment and be disabled and strictly and continuously confined in the house, and be therein visited and regularly attended by a legally qualified physician (M.D.) or surgeon (M.D.) or osteopath other than himself. In cases of illness which is non-confining, but otherwise limited as above, indemnification will be limited to two months. No indemnification in the form of a monthly non-confining sickness benefit will be paid for the first three days of disability after the first treatment by a legally qualified doctor, surgeon, or osteopath, and no indemnification will be paid except for the period after and during continuous medical treatment.

Policy A&H3, concerning which the representation set out in subparagraph 2 of Paragraph Five was made, provides that no payment shall be made in cases of sickness commencing prior to the effective date of said policy. And if the insured is a female, no indemnity will be provided for loss from pregnancy, childbirth or miscarriage. Nor is indemnity provided for any sickness occurring outside the 48 States, the District of Columbia, or Canada south of the 60 degree north latitude.

3. Respondent's policies BPI (1-52), A&H3-1949, and AAA (1-50), the policies concerning which the representation set out in subparagraph 3 of Paragraph Five were made, do not provide indemnification for all cases of acci- [fol. 15] dental injury. On the contrary, indemnification is provided only when such injury shall, commencing within 20 days after the date of the accident, at least, continuously disable and prevent the insured from performing one or more important daily duties pertaining to his occupation and while under regular medical care.

4. In fact, policy AE Rev. 9-52 provides for the payment of $150 for surgeons' fees for only six out of sixty-seven different listed operations. For twenty-nine of the listed operations, $25 or less is allowed.

5. Policy AE Rev. 9-52 does not provide for the payment of maternity benefits in addition to payments for room service and other hospital expense. Maternity benefits are paid in lieu of all other benefits provided by said policy for hospital services.

Paragraph Eight: The use by the respondent of the aforesaid false and misleading statements and representations with respect to the terms and conditions of its said policies and its failure to reveal the limitations of said coverage found in said policies have had and now have the tendency and capacity to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and representations were and are true and to induce said portion of the purchasing public to purchase insurance coverage from the respondent because of said erroneous and mistaken belief.

Paragraph Nine: The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive [fol. 16] acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission on this 14th day of October, 1954, issues its complaint against said respondent.

Notice

Notice is hereby given you, The American Hospital and Life Insurance Company, a corporation, respondent herein, that the 20th day of December, A. D. 1954, at 10 o'clock is hereby fixed as the time and San Antonio, Texas as the place when and where a hearing will be had before J. Earl Cox, a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. Such answer shall contain a concise statement of the facts which constitute the ground for defense and shall specifically admit or deny each of the facts alleged in the complaint, unless you are without knowledge, in which case you shall so state. Failure to file an answer

to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

[fol. 17] If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or of law under Rule XXI, and the right to appeal under Rule XXIII.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission and Hearing Examiner J. Earl Cox, without further notice, to find the facts to be as alleged herein and to issue the following order in this proceeding:

It Is Ordered that respondent, The American Hospital and Life Insurance Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from:

[fol. 18] (A) Representing, directly or by implication:

(1) That said insurance policy may be continued in effect indefinitely or for any period of time, when, in fact, said policy provides that it may be canceled by respondent or terminated under any circumstances over which insured has no control, during the period of time represented.

(2) That said policy provides for indemnification to insured in cases of sickness or accident generally or in any or all cases of sickness or accident, when such is not the fact.

(3 That said policy will pay in full or in any specified amount or will pay up to any specified amount for any

medical, surgical or hospital service unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented.

(4) That said policy provides for the payment of certain benefits in addition to other benefits when such is not the fact.

(B) Misrepresenting in any other manner or by any other means the terms or provisions of said insurance policy.

The inclusion of such order to cease and desist in this complaint will be without effect in the event you show cause, on or before the 20th day of December, A. D. 1954, why such order should not issue.

In Witness Whereof, the Federal Trade Commission has [fol. 19] caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C. this 14th day of October, 1954.

By the Commission.

Robert M. Parrish, Secretary.

BEFORE FEDERAL TRADE COMMISSION

PLEA TO JURISDICTION AND ANSWER—Received Nov. 9, 1954

To Said Honorable Commission:

Now comes The American Hospital and Life Insurance Company, named as Respondent in the complaint filed in the above styled and numbered cause, and appearing solely for the purpose of filing this plea contending that the Federal Trade Commission has no jurisdiction against The American Hospital and Life Insurance Company, and respectfully represents:

1. That by Act of Congress of March 9, 1945, Chapter 20, Sections 1 to 5, both inclusive, 59 Stat. 33 and 34, as [fol. 20] amended by Act of July 25, 1947, Chapter 326, 61 Stat. 448, now carried in the United States Code Annotated, Title 15, Sections 1011 to 1015, both inclusive, Congress declares that the continued regulation and taxation by the several states of the business of insurance is

in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states, and provided further that the business of insurance and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business; and provided further that no Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business unless such act specifically relates to the business of insurance with the proviso that after June 30, 1948, the Act of September 26, 1914, known as the Federal Trade Commission Act as amended shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

2. That Respondent does not transact any mail order business of insurance but deals through branch offices, agents and salesmen residing in the various states in which it has permits to do business, and that its business is transacted through individual and personal contacts between the managers, agents, salesmen and employees located in said states on the one hand and prospects for insurance and policy holders on the other hand.

3. That the subject of advertising and as to what constitutes improper advertising and as to what constitutes [fol. 21] false, deceptive and misleading statements and representations has been and is now being regulated by the laws of the various states in which Respondent has a permit to do business and in which it does do business, it being so regulated by said states law and by the Insurance Departments of the various states operating under said laws. That this Honorable Commission has no jurisdiction of the subject matter of the complaint which has been filed, such jurisdiction being denied by the Congress of the United States and therefore this cause should be by the Honorable Federal Trade Commission dismissed.

Wherefore, Respondent prays that this cause be dismissed for want of jurisdiction.

ANSWER

Without waiving the above and foregoing plea of jurisdiction, but still insisting on same and specifically subject

to the action of your Honorable Commission thereon, Respondent respectfully represents to the Commission:

A. Respondent denies that this complaint has been filed pursuant to the Act of Congress referred to in the first paragraph of the complaint, but respectfully represents that this complaint has been filed contrary to the provisions of said Act. Respondent denies the allegations of paragraph One of the complaint.

B. Respondent admits the allegations of Paragraph Two of the complaint only insofar as such allegations do not conflict with the facts set out in Respondent's plea to the jurisdiction hereinabove set out, and insofar as the allegation of said Paragraph Two conflict with Respondent's allegations set out in the plea to the jurisdiction they are hereby denied.

[fol. 22] C. Respondent admits that it has sold and is selling the policies listed (1) to (8) in said Paragraph Two.

D. Respondent admits that it is licensed in the states listed in Paragraph Three of the complaint, but Respondent denies the allegation contained in said Paragraph Three to the effect that it has sold a substantial number of its policies to insureds now residing in states other than those in which Respondent has been duly licensed, except there have been a few instances in which persons have purchased insurance policies in states in which Respondent is licensed to sell insurance, which persons have moved to states in which Respondent is not licensed to sell insurance, and such policy contracts being in effect Respondent does mail to such policyholders notices and receipts relating to the payment of renewal premiums and receives and accepts from such policyholders premiums mailed to it. That such contracts having been legally entered into in states in which Respondent is duly authorized to transact its insurance business it is equally obligated to carry out the terms of said contracts when such policyholders move to other states.

E. Respondent denies the allegations of Paragraph Four of the complaint alleging that Respondent has disdisseminated and caused to be disseminated in the form of circulars and other printed and written matter false, misleading and deceptive advertisements concerning the terms and provisions of the various policies of insurance

issued by it, and in this connection Respondent says that it is — no sense a mail order insurance company, that it does not send through the United States mails advertis- [fol. 23] ing matter to prospects for insurance, but that its advertising matter is transmitted to its branch offices in the various states and is used by the managers, salesmen and agents in connection with the presentation personally by said representatives of Respondent to prospects of insurance in connection with the application to be executed by such applicant if he or she makes application for insurance coverage. That such advertising matter is in the form of four leaf pamphlets on two of which is contained fair and true representations, on the third page of which is set out the application to be signed, and the fourth page of which is generally blank, but if it is not blank there merely appears thereon a schedule of rates, charged by Respondent for the various types of insurance policies offered. That said advertising matter contains the statement in large type either that the insurance offered is subject to the policy terms or that it is limited by the policy terms, or some similar statement, putting the applicant upon fair notice that the policy which is to be written contains provisions and limitations.

Furthermore, in connection with procuring the application of the prospect the agents and salesmen explain fully to the prospect the terms of the policies to be issued and the provisions and limitations as to the coverage of such policies. Respondent further alleges that all applicants for insurance are aware of the fact that there is no such thing in the trade and industry as a blanket policy which covers every condition of illness and every accident, but that every policy of insurance contains limitations of coverage, and Respondent says that all of its policies contain provisions which are fair and reasonable limitations of coverage and [fol. 24] this fact is well known to all of its applicants for insurance.

F. Respondent admits that the words set out in 1, 2, 3, 4 and 5 of Paragraph Five are contained in Respondent's advertising, but Respondent says that as set out in the complaint in many instances the words quoted in the complaint are only part of the statement made in the advertising, and the charge as made is wholly unfair because

quoting the rest of the sentence in which many of said words appear they are expressly limited and the meaning of the representation is in no sense the same as the complaint would imply.

Taking these up one by one:

"No age provision terminating or reducing benefits because of increasing age."

"Issued to men, women and children, ages 3-60."

"Issued to men and women, ages 18 to 60."

1. The provision first quoted appears in the advertising matter and the policy issued pursuant thereto does not contain any age provision terminating or reducing benefits because of increased age. Therefore, Respondent says that said representation is a fair and true representation of the terms of the policy issued pursuant thereto.

2. In reference to the provision "Issued to men, women and children, 3-60", Respondent says that said words do appear but the whole representation is not alleged. The whole representation appearing in bold face type is as follows: "Policy A(1) issued to men, women and children [fol. 25] 3-60. Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health."

Respondent says that said representation is entirely in accord with the policy issued, and Respondent further says that it is patently unfair for the complaint to be based on only a portion of said representation.

3. In reference to the provision "Issued to men and women, ages 18 to 60", Respondent says that said words do occur but the whole representation is not alleged. The whole representation appearing in bold face type is as follows: "Policy form ASA issued to men and women, ages 18 to 60. Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health."

Respondent says that said representation is entirely in accord with the policy issued, and Respondent further says that it is patently unfair for the complaint to be based on only a portion of said representation.

4. In reference to the provision "Confining illness indemnity for loss of time from illness, beginning on the fourth day and continuing for one year for each illness",

Respondent says that the words do occur but the complaint unfairly takes such representation entirely out of context and that the criticism thereof contained in the second paragraph of Paragraph Five is wholly unfair and unwarranted for the following reasons:

(a) On the same page on which said words occur there appears in bold face type in describing the policy to be [fol. 26] issued, "Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health." And, further, at the bottom of the page on which said words appear, also in bold type, there appears the following, "Benefits described above are contingent on recommendation of applicant by authorized company representative and *are subject to the terms of the policy issued.*" (Emphasis ours) Also, on said page as a part of the receipt which is furnished applicant there appears "If for any reason the application is not approved and policy issued this payment is to be refunded."

Furthermore, said statement appears on the left hand inside page of the folder and right hand inside page of the same folder is the application for the policy to be signed by the applicant. This application contains in bold type various questions to be answered by the applicant, the negative answers thereto constituting a representation that the applicant is and has been in good health. Furthermore, questions 16 and 17 to be answered affirmatively as a condition precedent to the issuance of the policy are a representation on the part of applicant not only that he or she must be in good health on the date of the issuance of the contract but also that such policy will not become effective unless the applicant is in good health on such issuing date, and furthermore, there is set out whatever limits the policy contains as to when the benefits are payable in relation to the inception of the illness.

Therefore, Respondent alleges that the charge of the complaint to the effect that misrepresentation has been made because the policy provides that no payment shall [fol. 27] be made in cases of illness commencing prior to the effective date of the policy is wholly unfair and without foundation because the application which the applicant signs contemplates not only that there shall be no sickness commencing prior to the effective date of the policy but

that if there is such illness that the policy never becomes effective at all. That the limitations contained in the policy as to non-coverage of pregnancy, child birth or miscarriage, and as to residents outside of the United States and in Canada north of 60° north latitude are entirely reasonable limitations because no representation is made in the advertising that all confining illnesses are covered and the applicant is placed upon notice of reasonable limitations by the statement made in bold type that all of the benefits described are subject to the terms of the policy issued.

Again Respondent calls attention to the fact that there is no such thing as an all inclusive illness policy but that all of such policies contain at least reasonable limitations of liability and all prospective purchasers of policies are well aware of the fact that policies do contain limitations of liability, and when the advertising matter states positively that the benefits offered are subject to the terms of the policy it is incumbent upon the applicant to inquire as to what limitations are contained in the policy, and Respondent alleges further that in selling all policies of insurance the agents and salesmen are directed to call the applicant's attention to the limitations contained in the policies and that such limitations are actually called to the attention of the applicant when the insurance is sold.

[fol. 28] . 5. In reference to the provision "It will pay medical costs for accidents", Respondent says that such statement is limited up to $500.00, and on the same page there is the provision in bold type to the effect that the benefits described above are subject to the terms of the policy issued. Respondent denies that such representation is in any way untrue or unfair, but Respondent says that the policy issued provides the benefits as represented.

6. In reference to the provision "Pays you a monthly income if you are disabled because of accident" Respondent says that said words do appear but the whole representation is not alleged. The whole representation appearing is as follows: "Pays you a monthly income when you are disabled because of accident, according to the terms of the policy." Furthermore, on the same page of the folder describing the policy to be issued there is the statement in bold type "Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health."

Respondent says that said representation is entirely in accord with the policy issued, and Respondent further says that it is patently unfair for the complaint to be based on only a portion of said representation. Respondent further says that when the representation in the same sentence and in the same bold type states that the coverage is according to the terms of the policy the applicant is put upon inquiry as to what limitations the policy contains, and Respondent says that the provision that the coverage is as to accident which in case of total disability wholly disables the injured person within 20 days after the accident, [fol. 29] and as to partial disability, partially disabling the insured within 20 days after the date of accident is a reasonable provision reasonably protecting the company against fraud and pretended and simulated accident, and is a limitation concerning which the applicant was put upon inquiry before he applied for the insurance.

7. In reference to the provision, "Covers accidents", Respondent says that said words do appear but the whole representation is not alleged. The whole representation appearing is as follows: "Covers accident, subject to the policy terms."

On the same page on which said words occur there appears in bold face type in describing the policy to be issued, "Only persons engaged in non-hazardous occupations are eligible, and all applicants must be in good health." Respondent says that said representation is entirely in accord with the policy issued, and Respondent further says that it is patently unfair for the complaint to be based on only a portion of said representation. Instead of the advertising matter being a representation that the policy to be issued will provide indemnification for all cases of accidental injury the advertising matter not only expressly limits the benefits to non-hazardous occupations but also to such limitations as the policy may contain, and there is no representation in the advertising matter anywhere that the policy will cover all accidents.

8. In reference to the provision "Pays from first day of disability for each accident", Respondent says that the policy issued does pay from the first day of disability for each accident covered by the policy; that the advertising [fol. 30] provides plainly that it covers accidents subject

to the policy terms; that only persons engaged in non-hazardous occupations are eligible and the applicant is fairly put upon inquiry as to the limitations contained in the policy and these limitations are explained to the applicant by the salesman in connection with taking the application for the policy.

9. In reference to the provision "Monthly indemnity for loss of time by accident", Respondent says that for the same reasons as hereinabove alleged as to the other provisions said representation is a fair representation of the policy to be issued and constitutes no false representation, either express or implied.

10. In reference to the provision quoted in Subsection 4 of Paragraph Five Respondent says that the detailed schedules of surgical operations set out in Respondent's policy is entirely in accord with the representation quoted.

11. In Paragraph Six, Sub-section 4, it is charged that the provision above referred to either directly or by implication represents that the policy provides for the payment of $150.00 for any operation serious enough to justify such a surgeon's fee. Respondent says that the representation referred to is in no way fairly subject to the implication charged. The representation from $3.00 to $150.00 depending on the seriousness of the operation carries with it no implication except payments will be made on a graduated scale dependent upon whether the operation is a trivial operation or a serious one and the only impression [fol. 31] that could fairly be acquired by the prospect is that a graduated schedule will be contained in the policy offered for sale. In the schedule referred to the benefits allowed are in accord with the relative difficulty and seriousness of the various operations. There is no representation in the advertising matter that the policy will pay the entire charge made by the surgeon, and Respondent says that the construction attempted to be placed on said representation in the complaint is unjustified by the language of the representation.

12. In Sub-section 4 of Paragraph Seven it is alleged that said representation is false, misleading and deceptive because the policy provides for the payment of $150.00 for surgeon's fee for only six out of sixty-seven different listed operations, and that for twenty-nine of the listed opera-

tions $25.00 or less is allowed. That as a matter of fact said schedule is as follows: Four operations at $5.00, five at $10.00, three at $15.00, five at $20.00, twelve at $25.00, three at $30.00, four at $40.00, nine at $50.00, six at $75.00, seven at $125.00, and six at $150.00.

Respondent represents that such graduation of fees is a fair and reasonable schedule of fees in response to the representation that Respondent pays from $3.00 to $150.00, depending on the seriousness of the operation, except that there are no operations in said schedule for which Respondent pays less than $5.00.

In reference to the allegations in the complaint relating to maternity benefits and the charge that placing maternity benefits under a heading "Additional Benefits" is misleading when the maternity benefits paid are in lieu of all [fol. 32] other benefits in the policy, Respondent says that it is well known that in many policies maternity benefits are excluded and therefore there is no misrepresentation in listing maternity benefits under the heading "Additional Benefits". It will be noted that in the advertising matter maternity benefits are limited to a lump sum stated in the advertising matter and this is a representation to the effect that said maximum is the greatest amount which will be paid in reference to maternity cases. However, if it is considered that said representation is not entirely clear, Respondent will be glad to place in its advertising matter the direct statement that the lump sum amount for maternity benefits is in lieu of all other hospital benefits in maternity cases.

For the reasons set out in detail above Respondent denies the allegations in Paragraph Six, Sub-sections 1, 2, 3, 4 and 5 of the complaint.

13. In reference to Sub-section 1 of Paragraph Seven of the complaint Respondent says that none of Respondent's advertising matter is inconsistent with the fact that Respondent's policies are term policies nor is there any representation in any of the advertising matter, either expressly or by implication, that Respondent's policies are non-cancellable policies.

14. In reference to Sub-section 2 of paragraph Seven of the complaint Respondent says that nowhere in Respondent's advertising matter is there a representation,

either expressly or impliedly, that Respondent's policies provide indemnification for ~~each~~, any or all sickness.

[fol. 33] 15. In reference to Sub-section 3 of Paragraph Seven of the complaint Respondent says that in none of its advertising is there any representation expressly or impliedly that it will provide indemnification for all cases of accidental injury.

16. Sub sections 4 and 5 of Paragraph seven have been fully answered hereinabove.

17. Respondent denies each and all of the allegations contained in Paragraph Eight of the complaint.

18. Respondent denies each and all of the allegations of Paragraph Nine of the complaint.

Wherefore, Respondent prays (1) that this cause be dismissed for want of jurisdiction; (2) subject to Respondent's motion to dismiss for want of jurisdiction, and only in the event that the same shall have been overruled, Respondent prays that this complaint be dismissed for want of substantial merit; (3) that the proposed order set out in the complaint be not entered, Respondent having shown cause by this answer (the allegations of which answer will be supported by substantial proof at the hearing) why such order should not issue.

Respectfully submitted, J. D. Wheeler, Attorney of Record for Respondent The American Hospital and Life Insurance Company.

Address: J. D. Wheeler, 1603 Alamo National Building, San Antonio 5, Texas.

[fol. 34] Before Federal Trade Commission

Minute Entries

Notice of Prehearing Conference, dated 11/24/54;
Notice of Hearing, dated 12/10/54;
Motion for Continuance, dated 12/16/54;
Order of Federal Trade Commission, dated 12/16/54 Cancelling Hearing;
Notice of Hearing, dated 4/13/55;
Supplemental Notice of Hearing, dated 5/10/55;

Motion to have Compilation of Pertinent Statutes submitted by Counsel supporting the Complaint admitted into the record as Commission Exhibit No. 58;

Order of Federal Trade Commission, dated 7/7/55 granting motion for admission into the record of Compilation of Statutes;

Omitted from the Printed Record, pursuant to Petitioner's Designation as to Printing Record, copied at page 1.

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[fol. 35] BEFORE FEDERAL TRADE COMMISSION

RESPONDENT THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY'S MOTION TO DISMISS NO. 2.—Received July 22, 1955.

To Honorable J. Earl Cox, Hearing Examiner:

Now comes The American Hospital and Life Insurance Company, by its Attorney of Record, and after Counsel supporting the complaint have rested the case in chief in support of the complaint, and before Respondent has offered any evidence and without waiving Respondent's motion to dismiss contained in Respondent's answer heretofore filed, Respondent moves the Commission to dismiss the complaint upon the following grounds:

The jurisdiction of the Federal Trade Commission, insofar as it is pertinent to the complaint filed herein, is limited to preventing unfair or deceptive acts or practices *in commerce*. (emphasis ours) None of the material [fol. 36] charged in the complaint as being to the prejudice and injury of the public and as constituting unfair and deceptive acts and practices ever moved in interstate commerce. The evidence is undisputed that none of this material ever moved across state lines except from the home office of Respondent to its branch offices in other states; the evidence being undisputed that at no time was any of this material sent by the home office of Respondent to any prospect in any other state.

The evidence is further undisputed that any handling of the material by any representatives of the Respondent

was wholly within the boundaries of the particular state in which said representatives operated.

Wherefore, it being undisputed that none of the material complained of having ever moved in interstate commerce, the Commission is without jurisdiction and the complaint should be dismissed for want of jurisdiction.

Premises Considered, Respondent prays that the complaint in this cause be dismissed for want of jurisdiction.

The American Hospital and Life Insurance Company,
By J. D. Wheeler, Attorney of Record.

[fol. 37] BEFORE FEDERAL TRADE COMMISSION

RESPONDENT THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY'S MOTION TO DISMISS NO. 3.—Received July 22, 1955.

To Honorable J. Earl Cox, Hearing Examiner:

Now comes The American Hospital and Life Insurance Company, by its Attorney of Record, and after Counsel supporting the complaint have rested the case in chief in support of the complaint, and before Respondent has offered any evidence and without waiving Respondent's motion to dismiss contained in Respondent's answer heretofore filed, and moves that the complaint herein be dismissed upon the following grounds:

1. The evidence introduced in support of the complaint is insufficient to establish that Respondent is guilty of making any false or misleading statements or representations with respect to the terms and conditions of its policies, [fol. 38] nor has it been shown that Respondent failed to reveal the limitations of coverage found in such policies, nor has it been shown that any of the material complained of would have the tendency and capacity to mislead or deceive, nor has it been shown that any person has been misled or deceived by any statements or representations made by Respondent.

2. There is no evidence in this record showing that the prosecution of Respondent under the complaint filed herein is in the public interest.

Wherefore, Respondent prays that the complaint herein be dismissed.

The American Hospital and Life Insurance Company,
By J. D. Wheeler, Attorney of Record.

BEFORE FEDERAL TRADE COMMISSION

MINUTE ENTRIES

Memorandum Brief of The American Hospital and Life Insurance Company;

Notice from J. D. Wheeler, Atty., to Division of Legal Records, Federal Trade Commission, dated 7/25/55;

Order of Federal Trade Commission designating date for submission of Proposed Findings, Conclusions and Memoranda, dated 8/2/55;

Brief of Counsel Supporting the Complaint in opposition to Respondent's Memorandum Brief which was filed in [fol. 39] support of Respondent's Three Motions to Dismiss Complaint;

Brief in Opposition to Respondent's Motion to Dismiss;

Appendix "A"—Analysis of Respondent's Advertisements showing States of Distribution and types of Representations as Classified in Brief;

Proposed Findings, Conclusion and Order and the reasons therefor submitted by Counsel supporting the Complaint;

Respondent's Reply Brief to Brief of Counsel supporting the Complaint;

Memorandum by Counsel supporting Complaint discussing Court Decisions mentioned for the first time in Respondent's Reply Brief;

Motion of Respondent, The American Hospital and Life Insurance Company that the original and 10 copies of Respondent's Proposed Findings of Fact and Conclusions of Law be filed, etc.;

Order of Federal Trade Commission receiving into the record Proposed Findings of Fact and Conclusions of Law as if timely filed, dated 10/17/55;

Proposed Findings of Fact and Conclusions of Law of Respondent, The American Hospital and Life Insurance Company;

[fol. 40] Order of J. Earl Cox, Hearing Examiner Closing Proceedings, dated 11/30/55;

Hearing Examiner's Rulings on Proposed Findings and Conclusions;

Omitted from the Printed Record, pursuant to Petitioner's Designation as to printing record copied at page 1.

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BEFORE FEDERAL TRADE COMMISSION

INITIAL DECISION. BY J. EARL COX, HEARING EXAMINER—December 7, 1955

The complaint herein charges that respondent, The American Hospital and Life Insurance Company, has disseminated false, misleading and deceptive statements and representations in advertisements relating to its health-and-accident insurance policies, and, by so doing, has en- [fol. 41] gaged in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 and 1015), sometimes referred to as the McCarran Act, but adverted to herein as Public Law 15.

Thereafter, respondent filed its answer and, in conjunction therewith, submitted a motion that the complaint be dismissed on the ground that the Federal Trade Commission is without jurisdiction in the matter. This motion was denied for the reason that the question of jurisdiction could be resolved satisfactorily only after evidence in support of the allegations of the complaint had been submitted. Hearings were then held, at which counsel in support of the complaint presented testimony and other evidence, which was duly recorded and filed in the office of the Commission. Respondent rested its case without presenting any additional evidence, renewed its motion to dismiss for lack of jurisdiction and submitted two further motions asking that the complaint be dismissed on the grounds that the acts and practices charged therein are not acts and practices in commerce, that there is insufficient proof in the record to establish that respondent's advertise-

ments are false or deceptive or that respondent has been guilty of unfair or deceptive acts or practices, and that "the further maintaining of the complaint is not in the public interest". Proposed findings of fact and conclusions of law have been submitted.

Some of the general facts are not seriously in dispute. [fol. 42] 1. Respondent, The American Hospital and Life Insurance Company, is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located in the City of San Antonio. It is authorized by charter to engage in life, health and accident insurance business, and is licensed to conduct such business in the states of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee and Texas.

2. Respondent maintains, and during the years 1953 and 1954 maintained a substantial course of trade in commerce, as that term is defined in the Federal Trade Commission Act, in health-and-accident insurance business, issuing policies to purchasers thereof located in each of the fourteen states in which it was and is authorized to do business. Among the policies so issued are the following, which are particularly specified in the complaint.[1]

(1) American Family Accident Policy, Form A(1),

(2) American Standard Accident Policy, Form ASA,

(3) All American Accident Policy, Form AAA,

(4) Income Protection Policy, Form A&H 3,

[fol. 43] (5) Business and Professional Men and Women's Income Policy, Form BPI,

(6) Preferred Individual Hospital and Surgical Insurance Policy, Form PRI,

(7) American Economy Hospital and Surgical Insurance Policy, Form AE Rev., and

(8) All American Automobile Accident Policy, Form AAAA.

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[1] There was also introduced into evidence a policy called The American President, Form API, but no charges relating to this policy are are set forth in the complaint, and counsel supporting the complaint do not mention it in their proposed findings.

3. Some of the persons who purchased policies from respondent while living in a state in which respondent was licensed to do business later moved to states in which respondent is not licensed. Nevertheless the insured-insurer relationship has been maintained, the respondent sending premium notices and receipts to these insureds not matter where they live and receiving from them premium payments by mail. To this extent respondent has been engaged in commerce with residents of states other than those in which it is licensed. However, there is no reliable, substantial, probative evidence that original sales were made by responent in states in which it was not licensed, or that respondent's advertising literature, containing the representations charged in the complaint to be false and deceptive, was circulated or used, in states in which it was not licensed, in connection with its renewal business. There were, therefore, no acts or practices in commerce in connection with this renewal business which come within the inhibitions of the Federal Trade Commission Act. Such representations as were made, so far as the evidence in this proceding shows, were made at the time of the original [fol. 44] sale of these policies, and that occurred in states in which respondent was licensed.

4. In connection with and to promote the sale of each of the policies listed above, the respondent prepared and issued a circular or brochure consisting of four pages. There is one exception—the circular relating to policy AE Rev. consisted of a single page. No other form of advertising was used by respondent, and no sales were made by mail. The brochures were sent by respondent from its home office to agents located in the various states in which it was licensed, and were used by them and often shown to prospective purchasers, as aids in selling the policies to which they relate. The first and second pages of each brochure contain advertising matter; the third page consists of an application form, and the last page either is blank or contains information helpful in determining premium rates. Upon completion of a sale the applicant for insurance filled out, or furnished the information for filling out, and signed the application form, which was then torn from the brochure and sent in to the respondent with the proper premium payment; the agent issued a receipt for the premium received, usually on the form at the bottom of the second page of the

brochure, and then left pages 1 and 2 of the brochure with the applicant. Upon acceptance of the application by the respondent, a policy was issued and transmitted to the selling agent for delivery to the insured. This was the usual procedure, as described by an officer of the respondent company, although, as he said, there may have been many variations. He had no direct knowledge of the selling methods actually used by respondent's agents in the field, but, for the purposes of this decision, it is assumed that each of the [fol. 45] brochures containing the statements charged in the complaint to be false and deceptive was shown to some prospective purchasers. No sales were made except through properly licensed agents.

Jurisdiction

It was decided in an early case that Federal Trade Commission jurisdiction must exist at the time of the issuance of an order.

"As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon." *Chamber of Commerce of Minneapolis, et al.*, v. *Federal Trade Commission*, 13 F 2d 673, 685; 8th Cir., 1926).

More recently, after specific reference to Section 5 of the Federal Trade Commission Act in which unfair or deceptive acts or practices in commerce are declared unlawful and the Commission is "empowered and directed to prevent * * * unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce", another Court said:

"And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurdisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of filing of the [fol. 46] complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids

action in the future" (*United Corporation et al.* v. ***F.T.C.***, 110 F(2d) 473, 4th Cir. 1940).

A determination of jurisdiction at this stage of the proceeding is, therefore, not a final determination, and any facts or events affecting jurisdiction which may occur after the issuance of the initial decision and prior to final order will have to be given consideration at the time of issuance of such final order. But a determination, though tentative, must now be made.

The pertinent provisions of Public Law 15 read as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

[fol. 47] "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

Public Law 15 was enacted to allay the considerable unrest and uncertainty which developed in the insurance industry and among officials in the insurance departments of the various states following the decision in *U. S.* v. *South Eastern Underwriters Association*, 322 U.S. 533 (1944), in which the Supreme Court held that insurance business, unless confined to a single state, is commerce as the term

"commerce" is used in the Constitution, the anti-trust laws, and the Federal Trade Commission Act. Prior to that decision, regulation and control of insurance by the states had not been questioned, and they had developed comprehensive regulatory and taxing systems which seemed to be limited only by the jurisdictional aspects of due process. Following the decision, had Congress remained silent, the Federal Trade Commission Act would have been applicable to the business of insurance in the same manner and to the same extent as it is applicable to other businesses in interstate commerce, the precedents of numerous Court decisions [fol. 48] would have been controlling, and Federal Trade Commission jurisdiction in the instant case would be indisputable.

In *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 409 (1946), the Supreme Court was faced with the interpretation of Public Law 15 as it applies to the taxation of an out-of-state insurance company by a state in which that insurance company was doing business under license. In sustaining state 'taxation', the Court laid down principles which are applicable to 'regulation' and are controlling in this case. In its decision, the Court, speaking through Justice Rutledge, said that by enacting Public Law 15, Congress

"* * * clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for"; and "intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance, by the national public interest, except in the specific respects otherwise provided for * * * "[2]

"Obviously, Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or [fol. 49] exercised, except as otherwise expressly provided

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[2] *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 409 (1946), p. 431.

in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.[3]

"Moreover, in taking this action, Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.[4]

The Court added:

"Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have lain some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power." 4

[fol. 50] Again speaking of Public Law 15, the Supreme Court, in a more recent case,[5] used these words:

"Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in *U.S.* v. *South Eastern Underwriters Association*, 322 U.S. 533, might be found to have on State regulation of insurance."

In another recent case[6] the Seventh Circuit Court, referring to Public Law 15, said:

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[3] *Prudential* case, *supra*, pp. 429-30.

[4] *Prudential* case, *supra*, p. 430.

[5] *Maryland Casualty Company* v. *Cushing*, 347 U.S. 409 at 413 (1954).

[6] *U.S.* v. *Sylvanus*, 192 F.2d 9 67th Cir., 1951, p. 100.

"It is clear, we think, that by this legislation the Congress established a perfect policy upon the part of the National government to refrain from interference with the regulation and taxation of insurance companies by the several States."

The power of Congress over commerce is not limited. It may remain unexercised, or it may be expressed by specific, direct, regulatory legislative enactment, or it may be exercised as in Public Law 15, by recognizing existing regulation by the states. The choice lies with Congress, and the Federal Trade Commission, as a creature of Congress, is bound by Congress' choice.[7]

[fol. 51] Justice Rutledge in the *Prudential* case, *supra*, after pointing out that there has been considerable judicial oscillation in interpreting the commerce clause, noted the trend of judicial thinking as follows:

"[For] concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic. * * * For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action".[7]

Following the logic of the *Prudential* case, the conclusion is reached that, under Public Law 15, Federal Trade Commission jurisdiction in the present proceeding is precluded to the extent that the states, in which respondent is licensed to conduct its insurance business, have regulatory statutes applicable to the acts and practices charged in the complaint to be false or deceptive.

All of the fourteen states in which respondent does business have comprehensive licensing statutes. Ten of them, Arizona, Arkansas, Colorado, Indiana, Kansas, Kentucky, Louisiana, New Mexico, Oklahoma and Tennessee, have regulatory statutes identical, or substantially identical, [fol. 52] with the "Model Unfair Trade Practices Bill For

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[7] *Prudential* case, *supra*, pp. 420-421.

Insurance" which was formulated for the specific purpose of meeting the requirements of the proviso clause of Public Law 15. The adequacy of that regulatory statute is unquestioned. It is modeled after the Federal Trade Commission Act and prohibits unfair methods of competition and unfair and deceptive acts and practices in the insurance business.

Missouri has two pertinent regulatory laws, the applicable parts of which are as follows: (Underscoring, except that of headings, supplied.)

Chapter 376, Life and Accident Insurance, of the Revised Statutes of Missouri, 1949:

"376.590. Misrepresentations, false estimates and circulars prohibited—agents—notes to be held until policy delivered.

1. *No life insurance company doing business in this state*, and no officer, director, or agent thereof, *shall issue or circulate*, or cause or permit to be issued or circulated, *any* estimate, illustration, *circular or statement of any sort misrepresenting the terms of any policy issued by it* or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof.

2. Any person who shall solicit an application for insurance upon the life of another shall, in any controversy [fol. 53] between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company and not the agent of the assured, nor shall any life insurance company or agent sell, discount or otherwise dispose of any note or notes taken for payment of life insurance premium or premiums, before delivering to the applicant, in person, the policy for which said note or notes shall have been given. (5844).

"376.600. Penalty for violating section 376.590.

Any life insurance company which may violate any of the provisions of section 376.590, or which may permit any of its agents or representatives in this state to violate said provisions, *shall have its certificate of authority or license*

to transact business in Missouri revoked by the state superintendent of insurance, and shall be for a period of five years barred from the further transaction of business in this state; and any agent, solicitor or representative in this state of any such insurance company who shall violate any of the provisions of said section shall be deemed guilty of a misdemeanor, and, on conviction thereof, in any court of competent jurisdiction in this state, shall be fined not less than fifty nor more than five hundred dollars for each such offense or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment. (5845).

Chapter 561, Crimes and Punishment:

"561.660. Publication of untrue, misleading or deceptive advertisements—penalty.

[fol. 54] 1. Any person, firm, corporation, or association who, with intent to sell or in anywise dispose of merchandise, securities, service or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public for sale or distribution or with intent to increase the consumption thereof or to induce the public in any manner to enter into any obligation relating thereto or to acquire title thereto or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in this state, in a newspaper or other publication or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter or in any other way, an advertisement of any sort regarding merchandise, securities, service or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor.

2. And shall upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or by both such fine and imprisonment, providing, that nothing herein shall apply to any proprietor or publisher of a newspaper or magazine who publishes, disseminates,

olates any such advertisement without the knowledge of the unlawful or untruthful nature of such advertisement."

The respondent is bound by the statutes of the State of Missouri. These statutes appear to be adequate to pro- [fol. 55] tect the residents of that state from false, misleading or deceptive insurance advertising practices, and therefore are regulatory of the business of insurance to the extent prescribed by Public Law 15 as being proscriptive of the applicability of the Federal Trade Commission Act.

The same is true of the statutes of the State of Illinois, which, in addition to imposing very stringent licensing requirements including provision for suspension or revocation of license if any law of the state is violated, provided, particularly as to insurance business, as follows:

Smith-Hurd Illinois Annotated Statutes (1954):

"Chapter 73, Section 761: *Misrepresentation and Defamation Prohibited.* (1) No company doing business in this state, and no officer, director, agent, clerk or employee thereof, broker, or any other person, shall make, issue or circulate or cause or knowingly permit to be made, issued or circulated any estimate, illustration, circular, or verbal or written statement of any sort misrepresenting the terms of any policy issued or to be issued by it or any other company or the benefits or advantages promised thereby or any misleading estimate of the dividends or share of the surplus to be received thereon, or shall by the use of any name or title of any policy or class of policies misrepresent the nature thereof.

* * * * * * *

"(5) Any company, officer, director, agent, clerk or employee thereof, broker, or other person who violates any [fol. 56] of the provisions of this section, or knowingly participates in or abets such violation, shall be required to pay a penalty of not less than one hundred dollars, nor more than one thousand dollars, to be recovered in the name of the People of the State of Illinois by the State's Attorney of the county in which the violation occurs and the penalty so recovered shall be paid into the county treasury."

The statutes of the State of Texas with respect to regulation of insurance need not be discussed, inasmuch as all

respondent's business within that State is intrastate business and hence is not subject to regulatory action on the part of the Federal Trade Commission.

Mississippi stands alone, therefore, as the one state in which there is no statute which can be found to be regulatory of false and deceptive acts and practices such as are charged against the respondent in the complaint in this proceeding. The only related statute of Mississippi is in Article 6, Section 5683 (1948) of Title 22 of the State Code, and is as follows:

"Any solicitor, agent, examining physician or other person who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any publication for insurance, or who shall make any such statement for the purpose of obtaining fee, commission, money or benefit in any corporation, transacting business under this chapter, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days."

[fol. 57] This statute is not applicable to the respondent corporation, and clearly is inadequate under the proviso clause of Public Law 15 to preclude the applicability of the Federal Trade Commission Act to the allegedly false and deceptive acts and practices in commerce carried on by the respondent with persons living in the State of Mississippi. To that extent the Federal Trade Commission has jurisdiction over the respondent and over the issues raised in the complaint. Conclusions hereinafter reached are based on facts relative to that commerce.

Issues of Fact

The gravamen of the complaint is that the terms and conditions of various policies issued by the respondent do not conform to representations made in the brochures pertaining thereto. Five representations charged to be false and misleading are specifically set forth in numbered subparagraphs of Paragraph Six of the complaint; advertising statements which allegedly support these representations are set forth in Paragraph Five; and the manner in which respondent's policies fail to conform to the repre-

sentations is alleged in Paragraph Seven. The issues of this proceeding are thus clearly defined. No instance of actual deception is shown in the record, and no evidence was offered to indicate how respondent's advertising statements were or might have been interpreted by prospective purchasers of health and accident insurance.

Charge No. 1:

The first charge of the complaint is that respondent has falsely represented "that the indemnification provided by [fol. 58] respondent's policies may be continued to age 60 or for an indefinite period at the option of the insured", and that this is not true because the policies are term policies renewable at the option of the respondent only, and are automatically terminated upon the payment of certain cash benefits.

The advertising statements quoted in the complaint, upon which this charge is based, are:

"No Age Provision terminating or reducing benefits because of increasing age."

"Issued to Men, Women, and Children, Ages 3-60."

"Issued to Men and Women, ages 18 to 60."

The first-quoted statement is from the lower left-hand corner of the first or cover page of a 4-page brochure relating to Policy, form ASA. It appears in the same location on the brochure relating to policy AAA. The statement seems to be perfectly clear and understandable. It states, in language about as simple and concise as can be used, that the policies to which it refers will not be terminated, nor will benefits be reduced, on account of increasing age of the insured. Some health and accident policies are automatically terminated and some provide for lower or reduced benefits after the insured has reached a specified age. Respondent's statement is that its policies contain no such provisions, and an examination of the policies shows that the statement is true. Respondent's policies contain no provision terminating or reducing benefits because of increasing age. There is no evidence in the record to the [fol. 59] contrary, and no showing that respondent has ever canceled a policy or reduced benefits because of the advancing age of a policy-holder.

The second and third statements are partial quotes from boxes outlined in color and conspicuously placed in the lower left-hand corner of the second page of each of the two brochures relating, respectively, to policies A(1) and A&H 3. The boxes are adjacent to or a part of the receipt form, and contain the following texts:

Policy Form A(1) Issued to Men, Women, and Children, Ages 3-60. Only persons engaged in non-Hazardous occupations are eligible and all applicants must be in good health.

Policy Form A&H 3 Issued to Men and Women, ages 18 to 60. Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

Similar statements are similarly presented in brochures relating to ASA and other policies. The statements need no interpretation. The language is clear that applicants for the various policies must be within the age limits specified. No reasonable person could ascribe any other meaning to this language as it appears in context. Respondent's policies to which these statements refer are issued to applicants within the specified age limits. No evidence to the contrary was adduced, and the conclusion must be reached that the statements are true. The statements have no reference to the renewability or non-renewability of the policies, nor to the manner in which, or the cause for which, a policy may be terminated.

[fol. 60] None of the statements quoted in the complaint, nor any similar statements contained in other literature circulated by respondent, can be interpreted as making the representation alleged in subparagraph 1 of Paragraph Six of the complaint that "the indemnification provided by respondent's policies may be continued to age 60 or for an indefinite period at the option of the insured". The reliable, substantial, probative evidence of record does not support the misrepresentation charged, and the complaint, as to the first charge thereof, should be dismissed.

Charge No. 2:

The second charge in the complaint, as stated in subparagraph 2 of Paragraph Six thereof, is that respondent has falsely and deceptively represented that its "policies provide indemnification for any or all sickness or illness".

According to Paragraph Seven, this representation relates specifically to policy A&H 3.

The advertising statement upon which the charge is based is from the second page of the brochure relating to respondent's A&H 3 policies, and is quoted in subparagraph 2 of Paragraph Five of the complaint as follows:

"Confining Illness Indemnity for loss of time from illness, beginning on the fourth day and continuing for one year for each illness . . .".

The full text and style of the statement, as it appears in the brochure, follows:

[fol. 61] "Confining Illness Indemnity, $ . . . . . per month for loss of time from illness, beginning on the fourth-day and continuing for one year for each illness. (Up to two months full benefits for nonconfining illness)." The foregoing is one of eight boxed items appearing in two columns on this page, across the bottom of which is the following statement in heavy, blackface type:

"Benefits described above are contingent on recommendation of applicant by an authorized company representative and are subject to the terms of the policy issued."

The format of this brochure is such that all advertising statements relating to the A&H 3 policy, and the premium receipt form, are on the second page; on the front or cover page the copy is general in nature; the fourth page is blank; and page 3 contains only the application form. Thus, all the advertising material can be seen at a glance and can be completely read in less than two minutes.

Any prospective purchaser of the A&H 3 policy who is interested enough to examine the brochure and who may have been attracted by the "Confining Illness Indemnity" bracket must have noticed also the "$ . . . . . per month" phrase, and his curiosity should have been aroused. If he looked at the entire page, he would see the statement across the bottom, that benefits are subject to the terms of the policy. If he were interested at all, it would be natural for him to inquire of the agent selling the policy. Since the law of Mississippi provides a fine and imprisonment for false and fraudulent statements on the part of an [fol. 62] insurance agent, it is assumed that the information which would thus be acquired by a prospective cus-

tomer living in Mississippi would be accurate and to the effect that respondent's A&H 3 policies do not cover all illness.

The question arises as to just how much care a prospective insurance customer must exercise before he selects or enters into an insurance contract. May he rely entirely on a printed advertisement when there is a duly-licensed agent available for questioning? May he select isolated phrases, clauses or sentences from an advertisement and base his conclusions upon his own interpretation thereof without regard to context or surrounding circumstance? Must the interpretation which he adopts be reasonable, or may it be facetious and unrealistic? These questions answer themselves. If the text of an advertisement may be interpreted piecemeal in the manner of the devil quoting Scripture, then reason and sound judgment have no place in the advertising field.

Any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence. If by some remote chance he did not so know, respondent's advertisements should alert him to that possibility. Certainly they would have no soporific effect. The statements hereinabove quoted, if read in context by an average person seeking health and accident insurance, would not engender the belief that indemnification would be available in every case of illness. [fol. 63] Furthermore, respondent's brochures were used for many months preceding the filing of the complaint in this proceeding. If there had been cases in which purchasers had been misled into such a belief by the contents of these brochures, that fact certainly could have become known and evidence of actual deception could and should have been presented. Absence of such evidence justifies a presumption that none exists and, although that presumption is not relied upon, the conclusion based upon all the facts relating to the A&H 3 brochure and the manner in which it was used is that the statements contained therein do not support the charge contained in subparagraph 2 of Paragraph Six of the complaint that respondent, by these statements, represents or has represented that its "policies

provide indemnification for any or all sickness or illness".

If it is assumed, *arguendo*, that respondent has made the representation charged, then, before a cease and desist order may issue in respect thereto, it must be established that the representation is false and deceptive in the six aspects set forth in subparagraph 2 of Paragraph Seven of the complaint. These will be considered *seriatim*.

(1) It is charged that not all illnesses are covered by respondent's policies, since benefits are limited to sickness "which shall wholly, necessarily and continuously disable and prevent the insured from engaging in any business, profession or employment and be disabled and strictly and continuously confined in the house and be therein visited and regularly attended by a legally-qualified physician [fol. 64] (M.D.) or surgeon (M.D.) or osteopath other than himself", and "In cases of illness which is non-confining, but otherwise limited as above, indemnification will be limited to two months. No indemnification * * * will be paid for the first three days of disability after the first treatment * * * and no indemnification will be paid except for the period after and during continuous medical treatment".

This qualifying language is in the A&H 3 policies. Counsel supporting the complaint urge that "under such a restriction the owner of a business dare not even make decisions necessary for carrying on his business while he is away. A woman, although necessarily, wholly and continuously confined, might be able to do needlework that could be sold for profit, but to do so would prevent her from collecting on the policy". Respondent's position is that such an interpretation is unrealistic and does not conform to the usual and customary meaning of the language as applied by respondent and as adopted by the Courts, which have held that these and similar provisions are in insurance policies for the purpose of enabling insurance companies to avoid the payment of fraudulent and fictitious claims.

Since jurisdiction in this proceeding rests largely, if not entirely, on that part of respondent's business which is carried on in the State of Mississippi, the law of that state is particularly apropos to the issues in this proceeding.

In *N. Y. Life Ins. Co.* v. *McGehee*, 10 SO 2d 454, 193 Miss. 549 (1942), the Supreme Court of Mississippi said:

[fol. 65] "This Court, in agreement with the majority in other states, has been liberal towards the insured in the interpretation and application of provisions in health policies in regard to total and permanent disability and as to when the disability is such as to prevent the insured from engaging in any occupation or employment for compensation or profit. We have endeavored to give to such provisions a practical and common sense construction, consonant with the equities of the particular case, and to grant relief according to substance rather than form;".

In *World Ins. Co.* v. *McKenzie*, 55 SO 2d 462, 212 Miss. 809 (Dec. 1951), the policy provision which was before the Court for interpretation was similar to that contained in respondent's A&H 3 policies. The facts in the case were that the insured had arthritis which required him to remain inside 75% of the time; the doctor "did not at any time visit the home of the insured" but did prescribe for him. There was evidence that the arthritic condition was incurable.

The Court, in sustaining a judgment for the insured, said that the terms of the policy should be liberally construed to carry out the spirit and purpose of the contract, and that the law will not enforce idle and useless formality, such as requirement of regular attendance of a physician when it can serve no useful purpose. The Court recognized that under a literal interpretation of the policy the insured could not recover, but said that this was not the correct application of the law, and that such provisions must be construed in the light of their purpose, which is to guard against fraudulent claims. The Court, quoting another case with approval, added:

[fol. 66] "When the reason for a contract provision disappears, the provision itself disappears as far as being a material element in the legal problems at hand."

Counsel supporting the complaint cites the case of *American Bankers Ins. Co.* v. *White*, 158 SO 346 (Miss. 1935) as not supporting the contentions of respondent and therefore as contradicting the foregoing decisions. Counsel has misinterpreted the *White* case. In that case the insured, a housewife, had suffered an injury which affected her eyesight. She could not perform her regular household duties, but did some sewing and helped with the cook-

ing. One witness testified that she was totally and permanently disabled. Her attending physician stated that she was partially disabled, and that he had not seen her regularly although she lived next door.

The policy involved in the *White* case contained provisions similar to those involved in the instant case, but it also contained a provision not found in respondent's policies, that:

"Strict compliance on the part of the Insured and Beneficiary with all the terms and conditions of this policy shall be a condition precedent to recovery hereunder, and any failure in this respect shall forfeit to the company all right to any indemnity".

Despite this unusually strong phraseology, the Court referred with approval to the Mississippi cases supporting the proposition that

"It is not necessary that the insured be wholly incapacitated to perform any duty incident to his usual employ- [fol. 67] ment or business, but that if the insured is prevented by his injury or illness from doing the substantial acts required of him in his business or occupation, or if his physical condition is such that, in order to be cured or to prolong his life, ordinary care and prudence require that he cease all work, he is totally disabled within the meaning of such policies".

The Court, referring to the policy provision requiring medical care, said:

"There is no reason why the insured could not have complied substantially with this clause of the contract, and it may have been absolutely necessary from the point of view of the insurer, in order that it might know that the disability was continuing and total."

The Court added that the injury to the eyes might have been relieved and full eyesight might have been restored by proper and constant attention. The Court said that as a matter of law it could not be held that the provision requiring attendance by a physician was not necessary in order to protect the insured against fraud.

The Court did not deny relief to the insured, but said that the question of the need for attendance by a physician was not fully or satisfactorily covered by the proof, and sent the case back for another trial. The *White* case does not contradict the holdings heretofore referred to, which in fact are later decisions, but supports them wholly.

[fol. 68] It is clear that policy provisions as to house confinement, abstinence from business duties, attendance by a physician, and similar phrases are not interpreted by the Courts, particularly by the Courts of Mississippi, as precluding recovery of indemnification for proper claims arising out of accidents or illness. Since the Courts have spoken, their interpretation is controlling, and the conclusion is reached that these provisions of respondent's A&H 3 policy do not constitute a limitation upon the illnesses for which holders of such policies may receive indemnification.

(2) Another phrase of this charge is that indemnification is not provided for any or all illness, inasmuch as in cases of nonconfining illness indemnification is limited to a period of two months. This has all the characteristics of a *non sequitur*. The charge is also founded upon a false premise which arises out of the fact that the complaint contains only a partial quote from respondent's brochure, as hereinabove indicated (p. 13). The omitted parenthetical statement "(Up to two months full benefits for non-confining illness)" is a clear description of the coverage of the policy, and there is no falsity or deception in this respect. It is difficult to understand why this phase of the charge was included in the complaint.

(3) Still another phase of this charge is that indemnification is not provided for any and all illness in that in nonconfining illness no indemnity will be paid for the first three days of disability after the first treatment by a doctor. The brochure clearly indicates that indemnification will begin "on the fourth day". The policy provides that the waiting period shall begin "with the date of the first per-[fol. 69] sonal treatment" by a doctor. This provision is in the policy obviously to discourage fraud. Otherwise any person with an inclination to malinger could feign illness, and there would be no way for the insurer to determine with any certainty whether or not the insured was actually ill. An examination by a doctor and a statement

from him as to the existence of an illness is the one positive way of determining that illness actually exists, and is a reasonable requirement and one that would be expected in any contract involving indemnification. Such a provision is not a contradiction of the statement contained in the brochure, but is a reasonable definition thereof. Neither is it a limitation of illnesses subject to policy coverage. The representation made in respondent's advertising in this respect is therefore not false or deceptive.

(4) It is also charged that respondent's A&H 3 policy has been falsely and deceptively misrepresented as covering any or all illness, whereas indemnification is not provided "in cases of sickness commencing prior to the effective date" of the policy.

Sickness is defined in the policy as meaning "sickness or disease contracted and commencing after the effective date" of the policy. Thus, under the policy, recovery cannot be had for disability due to a condition which existed prior to the effective date of the policy.

It would seem to be fundamental that insurance is purchased to take care of future contingencies. One cannot take out fire insurance to cover the loss of a building which has already burned, nor life insurance to compensate for a death that has occurred; nor accident insurance [fol. 70] to cover an accident which has taken place, nor sickness insurance to cover preexisting illness. If health and accident insurance could be obtained to compensate for pre-existing conditions, no one would procure a policy until after the event—and there would be no such thing as health insurance as that term is now commonly understood.

If the prospective purchaser of respondent's A&H 3 policy had any such misconception of insurance, that misconception should have been dispelled before he had reached the end of the application form; indeed, it should have been dispelled by the statement in the box in the brochure (hereinabove quoted, p. 12), in which it is stated "and all applicants must be in good health". In the application, following specific questions as to approximately 30 different diseases which the prospective insured might have had, there is a general question, "Have you now any disease or disorder?" and still another question asking for the details

as to any accident or sickness for which a doctor may have been consulted within the last five years. In the next-to-the-last question, the applicant is asked if it is understood and agreed that the insurance contract "shall not become effective unless to the best of your knowledge you are in good health on the date of the contract". How anyone could read the brochure and fill out the application form without realizing that the policy would not cover pre-existing illnesses is difficult to understand.

The question of whether a sickness has resulted from a condition which pre-existed the date of the policy is one of fact which, in the absence of fraud, would be interpreted by the Courts in favor of the policy-holder, as is indicated [fol. 71] by the many decisions which follow the logic of the cases hereinabove discussed, and from the general rule that where the language is of doubtful meaning every doubt is to be resolved against the insurer and in favor of the insured.

Counsel supporting the complaint have urged that respondent is obligated by its representations to pay indemnity where a post-policy illness arose out of a condition which pre-existed the policy date if the pre-existing condition was unknown to the insured. Upon direct inquiry by counsel, an officer of the respondent company stated that no claim had ever been denied by respondent where the pre-existing condition was unknown to the insured. To contradict this statement and "for the purpose of showing that the company had interpreted the policy to mean that they could refuse a claim where the pre-existing condition was unknown to the policyholder", counsel supporting the complaint presented in evidence, and urged by brief, the claim of Barbara E. Neal.[8] An examination of this claim discloses that the facts do not contradict the testimony of respondent's officer.

The Barbara E. Neal claim arose out of a tonsillectomy and adenoidectomy performed March 30, 1954, when she was 5 years 7½ months old. The policy was a family policy taken out on Barbara's fifth birthday, August 14, 1953, by her father, George S. Neal, an attorney of Clinton, Mississippi. The policy covered George S. Neal, his wife Bar-

[8] Commission's Exhibits 51A through 51Z1.

bara S. Neal, his daughter Barbara Ellen Neal and his son George S. Neal III. The file indicates that there were at [fol. 72] least two lapses in the policy, which, so far as this record shows, was finally reinstated March 3, 1954. The operation was twenty-seven days later.

The application for the policy contained a specific question as to whether the applicant or any dependent listed therein had then or ever had had any tonsil trouble, to which the applicant replied, "Yes", and, in explanation of this answer, stated that the tonsils of both he and his wife had been removed. No mention was made of any tonsil trouble of Barbara Ellen. In answer to a general question as to medical consultation or treatment, the application shows only that Barbara Ellen and her brother, George S., had been treated for colds by Dr. E. D. Reynolds. In two applications for renewal following the lapses,[9] filed December 7, 1953, and February 15, 1954, there is no mention of any illness of any member of the family.

The statement of the attending physician and authorization for Barbara Ellen's hospital entry was not executed until May 7, 1954, although it presumably refers to facts as of the date of admission, March 30, 1954. The statement is signed by E. D. Reynolds, M.D., and appears to be in his handwriting. He states that he has known this patient all her life, and, in answer to a question as to when the disease was contracted, says, "I have treated tonsils about 2 years". As to whether the disease was acute or chronic, the answer is "Acute—now". The required surgical procedure is checked as major. On May 31, 1954, Doctor Reynolds wrote a letter to respondent's representative in Jack- [fol. 73] son, Mississippi, qualifying these statements to some extent—not denying that he had treated the child for tonsil trouble, but stating that "this condition was one of the normal symptoms of childhood infections which are reflected in inflamed tonsils, sore throat and evidence of otitis media".

The statement of the operating surgeon, Dr. R. H. McArthur, was executed April 2, 1954. It shows that the patient first consulted him March 12, 1954. As to how

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[9] One of these applications for reinstatement was signed "George S. Neal, Jr. by Mrs Geo. S. Neal".

long prior to his first examination the disease had been contracted, he used just one word, "Indefinite". He attributed the origin of the disease to "Recurrent Infection", and classified the disease as "Chronic".

Under these circumstances, it would require an undue extension of the bounds of credulity to believe that the insured did not know at the time of the filing of his application that his five-year-old daughter had theretofore received medical care for tonsillitis and related symptoms. The extensive consideration given this claim supports rather than refutes the statement of respondent's officer that claims are paid by respondent when the insured does not or did not know of pre-existing conditions leading to the sickness for which indemnification is sought.

(5) The fifth respect in which the second representation is alleged to be false and deceptive is that, by the terms of the policy, "if the insured is a female, no indemnity will be provided for loss from pregnancy, childbirth or miscarriage".

[fol. 74] The brochure relating to the A&H 3 policy, which is the only policy to be considered under the allegations of this part of the complaint, makes no reference whatsoever to pregnancy or any of the possible disabilities that may arise therefrom. The policy itself unequivocally states, "If the insured is a female the policy does not cover death, disability or other loss resulting wholly or directly from pregnancy, childbirth or miscarriage".

The brochure and the attached application specifically refer to accident and sickness insurance. The policy provides benefits for disabilities and losses due to accident or sickness, nothing more. Pregnancy comes under neither classification, and there is a general understanding on the part of the public and particularly of prospective purchasers of insurance that unless pregnancy is specifically mentioned, indemnification for the disabilities and expenses that may result therefrom are not included in an accident-and-sickness insurance policy. A&H 3 accident-and-sickness policies are sold to both sexes between the ages 18 and 60, and are so drawn as to be applicable to contingencies that can happen to both. Pregnancy is not such a contingency. In insurance, a contingency refers to something that may happen at an unpredictable future time, due to un-

known, unexpected or unforeseen circumstances not within the control of the insured. Pregnancy cannot be so classed.

The A&H 3 policy is not a group policy nor a family policy, but strictly an individual policy applicable only to accident and sickness contingencies which the one individual named in the policy may encounter. Unless an individual applicant is one of the large general class and seeks [fol. 75] coverage for contingencies which may occur to all members thereof, he or she should not apply for the A&H 3 policy, but should seek a policy to cover losses for the specific conditions that he or she may anticipate or expect to encounter. Hence it is reasonable to expect, and it is believed to be true, that any female anticipating pregnancy and desiring indemnification in connection therewith will specifically look for insurance policies which relate thereto, and will not expect to be indemnified under a general policy available to the general public regardless of sex, age, or other circumstance.

It would be unreasonable to expect an insurance company to state in their advertising pertaining to a general policy, The Policy to Which This Advertising Relates Does Not Cover Pregnancy. In omitting such a red-flag warning in its brochure relating to its A&H 3 policy, the respondent can not be found to have indulged in any false and deceptive misrepresentation. Again attention is called to the fact that this is the brochure which carries the warning that benefits are subject to the terms of the policy.

(6) The final charge is that the representation is false, in that the A&H 3 policy does not provide indemnity for sickness occurring outside the forty-eight states, the District of Columbia or Canada south of 60° north latitude. There is no such exclusion in the A&H 3 policy, and this portion of the second charge is completely without support.

For the several reasons hereinabove set forth, it is concluded that the charges set forth in subparagraph 2 of Paragraph Six of the complaint have not been sustained by substantial, reliable, probative evidence.

[fol. 76] *Charge No. 3:*

The complaint, in subparagraph 3 of Paragraph Six, alleges that respondent has represented that its policies "provide indemnification for all or any accidents", and in sub-

paragraph 3 of Paragraph Seven, charges that "respondent's policies BPI (1-52), A&H3-1949, and AAA (1-50), the policies concerning which the representation set out in subparagraph 3 of Paragraph Five was made, do not provide indemnification for all cases of accidental injury. On the contrary, indemnification is provided only when such injury shall, commencing within twenty days after the date of the accident, at least, continuously disable and prevent the insured from performing one or more important daily duties pertaining to his occupation and while under regular medical care".

The issue is thus definitely limited to the three policies listed, and the truth or falsity of the representation made is to be determined by comparison of the statements contained in the brochures with the provisions of the three policies.

In subparagraph 3 of Paragraph Five, five advertising statements, referred to herein as (a), (b), (c), (d) and (e), are quoted, which, with other statements of similar import and meaning, constitute respondent's representation herein charged to be false and deceptive. The five quoted statements are:

(a) "It Will Pay Medical Costs For Accidents".

(b) "Pays You a Monthly Income when you are disabled because of accident * * *".

[fol. 77] (c) "Covers Accidents".

(d) "Pays from First Day of disability for each accident * * *".

(e) "Monthly Indemnity For Loss of Time by Accidents".

Quotation (a) is from the brochure relating to policy A(1); (d) is from the brochure relating to policy ASA. These quoted statements will therefore be disregarded, but other statements of "similar import and meaning" are found in the brochures relating to policies BPI, A&H 3 and AAA, and will be considered. Quotations (b), (c) and (e) are from the brochure relating to policy AAA, but are only partial quotes and out of context.

(c) is from a diagonally-placed, green-shaded box (about 2½ × 5¾" in size) across the upper half of the first or cover page of the AAA brochure. It is printed in large

type with distinctive green ink, in contrast with the other copy on that part of the page, which is in black ink. The box is a solid green-lined rectangle, bordered by green scallops. It is conspicuous. The full text is:

Covers Accidents (24 pt.).
Subject to Policy Terms (12 pt.)

(Type size indicated in the parentheses.)

Pays From First Day of Disability House Confinement Not Required Legal Reserve Protection.

[fol. 78] (b) is part of the first paragraph of descriptive material in the lower left-hand corner of the first or cover page of the same AAA brochure, appearing under the heading "Important Features Of This Plan". The full text of the paragraph follows:

"Pays you a monthly income when you are disabled because of accident, *according to terms of policy.*"

In (c) and (b) directly above, the emphasis is supplied to indicate the context phrases which are omitted in the quotations set forth in the complaint.

(c) is from the upper part of the second page of the same AAA brochure, and is the heading of a paragraph which, in its entirety, is as follows:

"Monthly Indemnity For Loss of Time By Accidents Pays from First Day of disability for Life while you are totally disabled. Pays 40% of monthly income up to three months, for partial disability."

No statements are quoted in subparagraph 3 of Paragraph Five of the complaint from the BPI and the A&H 3 brochures, which are practically identical. The A&H 3 brochure has previously been described. In each of these two brochures all the advertising material is on one page, across the bottom of which is the two-line statement in 12-point heavy type,

"Benefits * * * are subject to the terms of the policy issued".

If the two context clauses "subject to policy terms" and "according to terms of policy" from the cover page of the [fol. 79] AAA policy and the 12-point heavy-type sentence

above quoted from the BPI and the A&H 3 brochures are disregarded, the conclusion may be reached that respondent has represented that the three policies do provide indemnification for all or any accidents. But if these clauses are read and given equal credence with the other advertising material in conjunction with which they appear, no such conclusion is possible. The question again arises as to just how much and what part of an advertisement may be disregarded by a prospective purchaser of insurance.

An insurance policy is a contract. To set forth in a readable advertisement all the terms and provisions of that contract is a practical impossibility. All an advertiser can do is to call attention to the main features of the contract and, by appropriate language, red-flag any important qualifications or conditions. This the respondent has attempted to do in the three brochures here involved. The red-flagging has been done in a way which should attract the attention of any fair-minded, conscientious reader, and no such reader would be led to believe, from respondent's advertising, that the AAA, BPI, and A&H 3 policies cover, without exception, "all or any accidents". He would be on notice to seek further information.

As respondent's business was conducted, means of enlightenment were readily available. The brochures were handed to prospective customers by respondent's salesmen-agents. There was no general distribution. The application form is attached to and a part of each brochure and contains a provision that each applicant's signature [fol. 80] thereon must be witnessed by the salesman. The premium receipt form is likewise a part of each brochure. The applicant must be recommended by an authorized company representative. Under these circumstances every sale must result from a personal interview in which each prospective purchaser has full opportunity to discuss, inquire about and get full information concerning any policy in which he may be interested. It is therefore difficult to justify a finding that such a purchaser would be deceived or misled by a single phrase, clause, or sentence selected at random and out of context.

Insurance is not a tangible thing that can be seen, or pictured, or adequately described in a few words. A prospective purchaser cannot approach the buying of insurance

as he would the purchase of a pair of shoes, a garment, a piece of furniture or an article of food. It is common knowledge that an insurance policy should be read carefuly, and that those provisions in which the purchaser is especially interested should be checked thoroughly. This is not an endorsement of the principle of *caveat emptor*, but does mean that the prospective purchaser should have a definite understanding of, or procure an informed interpretation of, any insurance policy before he buys it. The Federal Trade Commission is enjoined by law to prevent unfair and deceptive acts and practices in commerce, but it is not required to be legal adviser to or personal guardian of every such prospective purchaser.

There is ample warning in respondent's brochures to alert any reasonably intelligent person to the fact that re- [fol. 81] spondent's BPI, AAA and A&H 3 policies do not attempt to provide full indemnification for *all* accidents under *all* circumstances. If a purchaser were unaware of that fact as a matter of common knowledge, he should have been made aware of it by the content of respondent's brochures.

Assume, arguendo, that the representation alleged in subparagraph 3 of Paragraph Six is supported by the statements contained in respondent's advertising. It is a fact that each of the three policies contains a provision to the effect that indemnification for total disability will be provided as stated in the AAA policy "when the injury shall, commencing within 20 days after the date of the accident, wholly, necessarily and continuously disable and prevent the insured from performing each and every duty pertaining to his occupation". The partial disability clause is phrased slightly differently, the expression "one or more important daily duties pertaining to his occupation" being substituted for the more restrictive "each and every duty" of the total disability clause. Identical or similar language appears in the BPI and A&H 3 policies.

As indicated in the discussion of Charge No. 2, above, the Courts put a very liberal interpretation on insurance terminology, and limit the restrictive, technical provisions of insurance policies to such reasonable interpretations as will protect the insurer from fraud, yet give the insured indemnification for all legitimate claims. The general rules laid

down in the cases cited above are applicable here. The language of the clause quoted in the complaint and contained in the policies, thus reasonably interpreted, does not con-
[fol. 82] stitute a limitation in contradition of the alleged representation here under discussion. Under such circumstances, this charge of the complaint must fail for lack of support by substantial, reliable, probative evidence.

Charge No. 4:

The charge of subparagraph 4 of Paragraph Six of the complaint is that policy AE Rev. 9-52, the policy referred to by the representation set out in subparagraph 4 of Paragraph Five, provides for the payment of $150.00 for any operation serious enough to justify such a surgeon's fee. The advertising statement quoted in subparagraph 4 of Paragraph Five is:

"Surgery from $3.00 to $150.00, Depending on seriousness of operation".

Proof of the falsity of this statement, the complaint states in Paragraph Seven, is shown by the fact that "policy AE Rev. 9-52 provides for the payment of $150 for surgeons' fees for only six out of sixty-seven different listed operations. For twenty-nine of the listed operations, $25 or less is allowed".

The single-page advertising sheet referring to respondent's AE Rev., policy contains the advertising statement quoted above, but it takes a high degree of imagination to read into that statement the alleged representation that the policy to which it refers would provide "$150 for any operation serious enough to justify such a surgeon's fee". It can only be interpreted to mean that 150 is the maximum fee that will be paid for even the most serious operation,
[fol. 83] and that payments ranging from $3.00 to $150.00 will be made in proportion to the seriousness of the operation.

If the interpretation stated in the complaint were accepted, there would be very few operations paid for by insurance companies which would not be claimed to be serious enough to justify a surgeon's fee of $150.00. The interpretation urged in the complaint cannot be accepted as a reasonable interpretation of the language used, nor as one

which would occur to any prospective purchaser who would read respondent's advertising sheet in which the statement appears.

Furthermore, there is no evidence in the record and no basis in general experience or common knowledge for reaching any conclusion as to what is a proper fee for any operation. A schedule in respondent's policy indicates what amounts will be paid for specific listed operations, but the fact that the policy provides for the payment of $150.00 for only six out of sixty-seven listed operations and $25.00 or less for twenty-nine is, in itself, not proof of the falsity of the representation charged against respondent in this part of the complaint, and this is the only respect in which the advertising with regard to respondent's AE Rev. policy is alleged to be false, misleading and deceptive.

The charges in the complaint as set forth in subparagraph 4 of Paragraph Six thereof fail, therefore, because they are not supported by substantial, reliable, probative evidence, and the complaint as to them should be dismissed.

[fol. 84] *Charge No. 5:*

The last charge of the complaint is based on the contents of the same advertising sheet, and refers to the same AE Rev. policy as one involved in Charge No. 4.

The charge is that in its advertising statements the respondent has represented that this policy "provides for the payment of maternity benefits in addition to payments for room service and hospital expense", and that this representation is false because the policy does not so provide, but pays maternity benefits "in lieu of all other benefits provided by said policy for hospital services". The advertising statements quoted in the complaint are:

"Room Service . . . Hospital Expense . . . Surgery . . . Additional Benefits . . . Maternity . . ."

More than one-half of the upper portion of the single-page advertising sheet pertaining to the AE Rev. policy is occupied with three, starred, 24-point, block-type headings and the text appertaining thereto. The headings are:

"* Room Service," "* Hospital Expense," "* Surgery", The "*Surgery" text has been hereinabove referred to, and is the one quoted in full in the complaint, in support of

Charge No. 4; the "* Room Service' heading is followed by a one-line statement "31 days each entry"; "* Hospital Expense" is amplified by seven numbered items followed by a summarizing statement:—"Any service of the hospital necessary to the recovery of the patient".

[fol. 85] Lower down on this page, in 18-point script type, is the heading "Additional Benefits", and under this are four sub-headings:

"Ambulance Service, Maternity, Emergency Hospital Service, Accidental Death, Dismemberment or Loss of Sight Before Age 65".

Under the "Maternity" sub-heading is the following:

"Up to $ ..... after insurance has been in force 10 months.

The AE Rev. policy is a hospital and surgical insurance policy, and does not cover maternity benefits except by a supplemental rider which may be attached thereto. This rider provides:

"The company agrees to pay a sum not exceeding ten times the daily amount stipulated in the policy for room service for actual charges made for hospital services resulting from pregnancy including childbirth or miscarriage *in lieu of all other benefits provided in the policy for hospital services*" (emphasis supplied).

The part in *italics* is emphasized in the rider by being printed in heavy, blackface type. Specific amounts are set out for Caesarian operation, for extra-uterine abdominal operation, and for miscarriage.

It would seem to be clear that the meaning of the rider is that the respondent pays in maternity cases the specified amounts for hospital and surgical procedures resulting [fol. 86] from pregnancy, and that such payments in no way affect respondent's liability to pay the amounts prescribed in policy AE Rev. for hospitalization and surgery due to other causes. Maternity benefits are thus in addition to those provided by the policy itself, and this is what the advertisement states; hence there is no misrepresentation.

If the interpretation suggested in Paragraph Six of the complaint and urged by counsel in support of the complaint were accepted it would mean that an insured in a pregnancy case would recover the benefits provided therefor in the rider plus the benefits provided in the policy for non-maternity cases. To postulate such an interpretation ideas and concepts which are foreign to the actual printed matter would have to be interpolated into respondent's advertising. Such an interpretation would not normally occur to a prospective purchaser and would be an unjustified basing of inference upon inference.

Charge No. 5 of the complaint should be dismissed as not supported by substantial reliable, probative evidence.

Conclusions

The Federal Trade Commission has jurisdiction in this proceeding to the extent hereinabove stated. The proceeding is in the public interest. The allegations of the complaint charging the respondent with making false and misleading statements and representations with respect to the terms and conditions of its policies in general or with respect to the terms and conditions of specific policies have not been established by substantial, reliable, probative [fol. 87] evidence. Accordingly, it cannot be found that the respondent has violated the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in commerce to the prejudice and injury of the public. Therefore,

It Is Ordered that the complaint herein be and the same hereby is dismissed.

J. Earl Cox Hearing Examiner.

December 7, 1955.

Mailed Dec. 15 1955, Legal Records.

[fol. 88]

Before Federal Trade Commission

Notice of Intention to Appeal—December 19, 1955

Joseph Gallaway and William R. Kearney, counsel supporting the complaint hereby give notice of their intention

to appeal to the Commission from the initial decision of the hearing examiner which was served on them December 15, 1955.

Joseph Callaway, William R. Kearney, Counsel Supporting the Complaint.

Dated this 19th day of December 1955.

Mailed Dec. 21, 1955, Legal Records.

[fol. 89] BEFORE FEDERAL TRADE COMMISSION

MINUTE ENTRIES

Appeal Brief of Counsel in Support of the Complaint:

Request to the Commission for Oral Argument by Counsel supporting Complaint;

Motion of Respondent, The American Hospital and Life Ins., Co., to extend time for filing its brief in reply to appeal brief of counsel in support of the Complaint;

Notice of Robert M. Parrish, Secretary of Federal Trade Commission, dated 2/2/56 relative to time and place for argument, etc.;

Order of Federal Trade Commission, dated 2/7/56 extending time for filing of Answering Brief;

Answering Brief of The American Hospital and Life Ins. Co.;

Motion of Respondent, The American Hospital and Life Insurance Co., to include Mississippi Law in Record;

House Bill No. 145 enacted by the 1956 Legislature of the State of Miss.;

Omitted from the Printed Record, pursuant to Petitioner's Designation as to printing record copied at page 1.

* * * * * * * *

[fol. 90] BEFORE FEDERAL TRADE COMMISSION

Findings as to the Facts, Conclusions and Order—Issued April 24, 1956

Commissioners: John W. Gwynne, Chairman, Lowell B. Mason, Robert T. Secrest, Sigurd Anderson, William C. Kern.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 14, 1954, issued and subsequently served upon respondent, The American Hospital and Life Insurance Company, a corporation, its complaint, charging said respondent with the use of unfair and deceptive acts and practices in commerce in the sale of health and accident insurance policies, in violation of the provisions of the Federal Trade Commission Act.

Thereafter, respondent filed its answer and, in conjunction therewith, a motion for dismissal of the complaint on the ground that the Commission is without jurisdiction in the matter. This motion having been denied by the hearing examiner duly designated in the complaint, [fol. 91] for the reason that the question of jurisdiction could be resolved satisfactorily only after the submission of evidence, certain testimony and other evidence in support of the allegations of the complaint were introduced before the hearing examiner and were duly recorded in the office of the Commission. No further evidence having been presented by respondent, the matter was considered by the hearing examiner upon the complaint, respondent's answer thereto, the testimony and evidence, proposed findings as to the facts and conclusions presented by counsel, and additional motions for dismissal, filed by respondent, and the hearing examiner, on December 8, 1955, filed his initial decision in which he ordered that the complaint be dismissed.

Within the time permitted by the Commission's Rules of Practice, counsel in support of the complaint filed an appeal from said initial decision, and the Commission, after considering said appeal, respondent's brief in opposition thereto, oral arguments of counsel, and the entire record herein, rendered its decision granting the appeal and vacating and setting aside the initial decision.

Thereafter, this matter came on for final consideration by the Commission, and the Commission, being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order, which, together with the aforesaid decision on the appeal shall be in lieu of the initial decision of the hearing examiner.

[fol. 92] FINDINGS AS TO THE FACTS

1. Respondent, The American Hospital and Life Insurance Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at Pecan & St. Mary's Streets in the City of San Antonio, State of Texas. Said respondent is authorized by charter to engage in, and it does engage in, the business of life, health and accident insurance. It is licensed to conduct such business in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee and Texas. Respondent's life insurance business is not involved in this proceeding.

2. Respondent maintains a substantial course of trade in commerce as that term is defined in the Federal Trade Commission Act, in health and accident insurance, issuing policies to purchasers thereof located in each of the fourteen States in which it is authorized to do business. Among the policies so issued are those for individuals and family groups identified by respondent as follows:

(1) American Family Accident Policy, Form A (1).

(2) American Standard Accident Policy, Form ASA.

(3) All American Accident Policy, Form AAA.

(4) Income Protection Policy, Form A&H3.

[fol. 93] (5) Business and Professional Men and Women's Income Policy, Form BPI.

(6) Preferred Individual Hospital and Surgical Insurance Policy, Form PRI.

(7) American Economy Hospital and Surgical Insurance Policy, Form AE Rev.

(8) All American Automobile Accident Policy, Form AAAA.

The substantiality of respondent's busines is indicated by the fact that its premium receipts from its health and accident insurance business during the year 1953 was $4,835,523.05 and during the year 1954 was $5,009,184.47.

3. Respondent's health and accident insurance business is conducted through agents in the various States in which respondent is licensed. When an agent in any State other than Texas secures an application for a policy, the application is sent through the mail by the agent to respondent's home office in San Antonio, Texas, where the policy is issued. The policy is then mailed back to the agent in the other State for delivery to the purchaser.

4. A substantial number of persons who have purchased policies of health and accident insurance from respondent while living in States in which respondent was licensed to do business have later moved into States in which respondent was not so licensed. It is respondent's practice in such cases to mail to such insureds or policyholders premium notices and recepits and to receive from them [fol. 94] premium payments renewing the coverage afforded by their policies. Premium payments so received by respondent from States other than those in which it was licensed to do business for the year 1953 amounted to $47,305.72, and for the year 1954 amounted to $78,417.89. To this extent respondent is regularly engaged in commerce with residents of States other than those in which it is licensed to do business.

5. In connection with and to promote the sale of each of the policies listed in paragraph 3, above, respondent prepares and issues a circular or brochure consisting of four pages. There is one exception—the circular relating to the policy Form AE Rev. consists of but a single page. The brochures are sent by respondent from its home office in San Antonio, Texas to its agents located in the various States in which respondent is licensed, and are used by such agents, and often shown by them to prospective purchasers, as aids in selling the policies to which they refer. The first and second pages of each brochure contain advertising matter; the third page consists of an application form; and the last page either is blank or contains information helpful in determining premium rates. Upon completion of a sale, the applicant for insurance fills out, or fur-

nishes the information for filling out, and signs the application form, which is then torn from the brochure and sent in to respondent with the proper premium payment; the agent issues a receipt for the premium received, usually on the form at the bottom of the second page of the brochure, and then leaves pages 1 and 2 of the brochure with the applicant. Upon acceptance of the application at its home office, respondent issues the policy and trans- [fol. 95] mits it to the selling agent for delivery to the insured.

6. In the brochure relating to respondent's policy, Form ASA, the following advertising statements are made:

"No Age Provision terminating or reducing benefits because of increasing age," and

"Policy Form ASA issued to Men and Women, ages 18 to 60. Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health."

The same statements are made in the brochure relating to the policy, Form AAA.

The complaint alleges that through the use of these statements, respondent represents that the indemnification provided by its policies may be continued to age 60 or for an indefinite period at the option of the insured. Such representation is false, the complaint charges, because respondent's policies are term policies and are renewable at the option of respondent only. Further, the policies are automatically terminated upon the payment of certain cash benefits.

The Commission does not construe these statements as having the meaning ascribed to them. Said statements can be reasonably read to mean only that the policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified; and the evidence is that the statements as so construed are both true. [fol. 96] On this phase of the case the allegations of the complaint have not been sustained.

7. In the advertising section of the brochure relating to respondent's policy, Form A&H3, the following, among other boxed items, appears:

"Confining: Illness: Indemnity: $ ..... Per Month. for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. (Up to two months full benefits for non-confining illness.)"

Substantially similar statements are made in the brochure relating to respondent's policy, Form BPI. The record shows that the blank amount of dollars is usually filled in by the agent before or at the time he is talking to the prospect, based on the premiums paid.

Through such statements, respondent represents, directly and by implication, that its policies provide indemnification for loss of time due to any and all sickness or illness.

In truth and in fact, respondent's policies do not so provide. The coverage under the policy, Form A&H3, is expressly restricted to indemnification for loss of time due to sickness or disease contracted and commencing after the effective date of the policy and while the policy is in force which wholly, necessarily and continuously disables and prevents the insured from engaging in any business, profession or employment for wage or profit and only for such period of time as the policyholder is regularly visited and [fol. 97] attended by a legally qualified physician (M.D.), surgeon M.D.) or osteopath, other than himself. Nor does the policy cover loss of time for illness due to pregnancy, miscarriage or childbirth in case of a woman policyholder, regardless of how long the policy has been in effect. The policy, Form BPI, also contains substantially the same restrictions on respondent's liability, none of which restrictions are disclosed in the sales brochures.

Respondent's representations as to the indemnification provided by its policies for loss of time due to sickness or illness are, therefore, false and deceptive.

8. Respondent's brochure relating to its policy, Form BPI, also contains the following with respect to loss of time due to accidents:

"Total Accident Disability: $ ..... Per Month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled." and

"Partial Accident Disability: $ ..... Per Month for loss of time from accidental injury, beginning with the first

day and continuing for the period of partial disability (limit 3 months)."

Substantially the same statements are also made in the advertising sections of the brochures relating to respondent's policies, Forms A&H3 and AAA.

Through such statements, respondent represents, directly and by implication, that its policies provide indemnification for loss of time due to all or any accidents.

[fol. 98] In truth and in fact, respondent's policies do not so provide. Under the policy, Form BPI, respondent's liability for loss of time due to total accident disability is limited to accidents that shall within twenty days after the date of the accident wholly, necessarily and continuously disable and prevent the insured from performng each and every duty pertaining to his occupation for the first twelve months. After that time, the insured, in order to collect the indemnity, must be wholly and continuously disabled by reason of the accident from engaging in any occupation for wage or profit. Futhermore, the policy expressly limits the company's liability for loss of time due to either total or partial accident disability to such periods of time as the policyholder is under the regular care of a legally qualified physician (M. D.), surgeon (M. D.) or osteopath, other than himself. The policies, Forms A&H3 and AAA, contain similar limitations on respondent's liability, none of which limitations is disclosed in the sales brochures.

Respondent's representations as to the indemnification provided by its policies for loss of time due to accidents are, thus, false and deceptive.

9. Respondent's advertising brochure for its policy, Form AE Rev., contains the following:

"*Room service
31 days each entry
*Hospital Expense
1. Operating Room
2. Anaesthetics
[fol. 99] 3. Laboratory Service
4. X-Rays
5. Dressings
6. Drugs
7. Blood transfusions

Any service of the hospital necessary to the recovery of the patient.

Surgery

From $3.00 to $150.00 $150.00

Depending on seriousnes of operation.

Additional Benefits

* * * Maternity: Up to $ after * * * insurance has been in force 10 months. * * *"

Through such statements, respondent represents, among other things, that said policy provides indemnity up to a maximum sum of $150 for any operation serious enough to cost such an amount, and that the maternity benefits mentioned are in addition to payments for room service and hospital expenses.

Actually, the policy does not so provide. Under the terms of this policy, payment for surgeon's bill is in accordance with a schedule of fixed fees for different types of operations. Only six out of sixty-seven operations listed call for a surgeon's fee of as much as $150. For twenty-nine of [fol. 100] the listed operations, the surgeon's fees allowed are $25 or less, regardless of the actual cost of such operations to the policyholder.

Said policy likewise does not provide for the payment of a maternity benefit after ten months, or at any other time, in addition to the payments provided for room service and other hospital expenses. The maternity benefit is obtainable only by payment of an additional premium over and above the regular premium provided in the policy and is covered by a supplemental agreement or rider attached to the policy. Moreover, said supplemental agreement or rider expressly provides that payment of the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital services," and it is, thus, clear that the maternity benefit, instead of being an additional benefit, as represented is merely a substitute.

Respondent's representations to the contrary are false and deceptive.

Conclusions

1 The Federal Trade Commission has jurisdiction over all of the respondent's acts or practices alleged in the complaint to be unlawful

2. The public interest in the proceeding is clear and substantial.

3. The use by respondent of the statements and representations, found herein to be false and deceptive, with respect to the terms and conditions of its policies of insur- [fol. 101] ance, and its failure to reveal the limitations of the coverage of said policies, have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce the purchase of said policies of insurance because of such erroneous and mistaken belief.

4. The aforesaid acts or practices of respondent as above set forth are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act.

ORDER

It Is Ordered that respondent, The American Hospital and Life Insurance Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from representing, directly or by implication:

1. That said policy provides for indemnification against losses due to sickness or accident, unless a statement of all the conditions, exceptions, restrictions and limitations affecting the indemnification actually provided are set forth conspicuously, prominently, and in sufficiently close conjunction with said representation as will fully relieve it of all capacity to deceive.

[fol. 102] 2. That said policy provides for payment in full or in any specified amount or for payment up to any specified amount for any medical, surgical or hospital service, unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented, or unless full disclosure of the sched- [fol. 103] ule of payments for which the policy provides is made conspicuously, prominently, and in sufficiently close

conjunction with said representation as will fully relieve it of all capacity to deceive.

3. That said policy provides for the payment of certain benefits in addition to other benefits when such is not the fact.

It Is Further Ordered that the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission. Commissioners Gwynne and Mason dissenting.

(S.) Robert M. Parrish, Secretary.

Issued: April 24, 1956.

S.A., R.T.S., L.B.M., W.C.K., J.W.G.

Attached is Majority Opinion of the Commission.

Attached is Joint Dissenting Opinion of Commissioners Gwynne and Mason, and Additional Views of Commissioner Mason.

[fol. 104] BEFORE FEDERAL TRADE COMMISSION

Commissioners: John W. Gwynne, Chairman, Lowell B. Mason, Robert T. Secrest, Sigurd Anderson, William C. Kern.

Docket No. 6237

In the Matter of:

The American Hospital and Life Insurance Company, a corporation

OPINION OF THE COMMISSION—April 24, 1956

By Kern, Commissioner:

Counsel in support of the complaint issued in this proceeding has appealed from the hearing examiner's initial decision, in which, after holding that Public Law 15 of the 79th Congress (McCarran-Ferguson Insurance Regulation Act)[1] limit the Federal Trade Commission's jurisdiction herein to respondent's activities in the State of Mississippi, he dismissed the complaint for failure of proof.

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[1] 59 Stat. 33 (1945); 15 U.S.C. 1011ff.

Respondent, a Texas corporation, is licensed to conduct, and does conduct, a health-and-accident insurance business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. It sells its [fol. 105] health-and-accident insurance policies exclusively through licensed agents in each of those States, and its only advertising consists of printed brochures, which it mails from its home office in San Antonio, Texas, to its agents in other States for display or distribution to prospective policyholders in the course of sales interviews. Applications secured by respondent's agents in States other than Texas are mailed to respondent's home office, where the policies are issued and mailed to the agents for delivery to the new policyholders. The complaint alleged that respondent's advertising contains various false, misleading and deceptive representations in violation of the Federal Trade Commission Act. Respondent maintains that all States in which it carries on its operations have laws that forbid it or its agents to make misrepresentations in the course of selling its insurance and that under the McCarran-Ferguson Act this is sufficient to remove it from the scope of the Federal Trade Commission Act.

Thus at the threshold of our consideration of this appeal we face an important jurisdictional question. The basis of the hearing examiner's holding that the Commission's jurisdiction extends to respondent's transactions in Mississippi alone is that each of the other States where it advertises or sells its insurance policies (saving from consideration respondent's home State of Texas, inasmuch as jurisdiction has not been asserted over respondent's business transacted wholly within that State) fully regulates the business of insurance by legislative enactment and that to the extent such regulation exists our jurisdiction has been withdrawn by the McCarran-Ferguson Act.

[fol. 106] That statute [2] directly and expressly provides

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[2] The McCarran-Ferguson Act reads in full text as follows:

An Act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives

that after January 1, 1948, the Federal Trade Commission Act shall apply to the business of insurance "to the extent that such business is not regulated by State law." In the judgment of the examiner, the Commission's jurisdiction over the commercial activities of insurance companies is contingent upon an absence of State regulatory legislation. Implicit in that view is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. We need scarcely point out that such a concept not only neglects the exclusive Federal jurisdiction over commerce *among* the States, conferred by Section 3 of Article 1 of the Constitution of the United States, but is inconsistent with the fundamental constitutional doctrine of the separation of State and Federal powers.

[fol. 107] We do not think that the McCarran-Ferguson

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of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of

Act, considered solely by its terms or along with its legis-
[fol. 108] lative history and judicial interpretation, admits of such a construction.

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), the Supreme Court in effect overturned *Paul* v. *Virginia*, 75 U.S. 168 (1868), and the line of related cases, all of which were bottomed on the principle that contracts of insurance are not commerce, either interstate or *intra*state, and declared that the conduct of fire insurance business across State lines is "Commerce among the several States" and accordingly a conspiracy to monopolize interstate trade and commerce in that business vio-
[fol. 109] lates the Sherman Antitrust Act. At the same time the Court pointed out that, for constitutional purposes, certain activities of a business may be *intra*state and hence subject to State control, while other activities of the same business may be interstate and subject to Federal regula-

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October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

tion. However, the Court did not attempt to decide which State laws were applicable to the business of insurance and to what extent they were not applicable. A local insurance company which sold only within the State was clearly subject to the State laws, but the extent to which a company doing an interstate business was subject to State laws was not made clear.

The McCarran-Ferguson Act was enacted this year following *South-Eastern Underwriters*. Its title states that it is an act to express the intent of Congress with reference to the regulation of the business of insurance. The title does not suggest that Congress was undertaking to give any additional jurisdiction to the States or to take any away; it indicates rather an intent to avoid any ambiguity arising out of the Congressional silence. It appears that the McCarran-Ferguson Act was designed to permit the States to regulate, *in the traditional manner*, the business of insurance. It was not designed to permit insurance companies to secure new business by false or misleading advertising in interstate commerce, nor was it intended as an abdication of Federal jurisdiction under the Sherman, Clayton, and Federal Trade Commission Acts over the business of insurance. Had Congress desired to remove the business of insurance from the scope of these laws, it could have done so by simply providing that for the purpose of those statutes the business of insurance across State lines should not be [fol. 110] deemed to be "Commerce among the several States." Quite to the contrary, it expressly applied those laws to the business of insurance within certain limits.[3]

[3] The original version of the McCarran-Ferguson Act, as reported by the committees of the respective Houses of Congress, provided flatly that neither the Federal Trade Commission Act nor the Robinson-Patman Act should "apply to the business of insurance or to acts in the conduct of that business." In debate on the floor of the House the wisdom of such an exclusion was questioned (91 Cong. Rec. 1027), and the Chairman of the House Committee on the Judiciary offered to propose to the Joint Committee of Conference the elimination of the exclusionary section and the inclusion of the Federal Trade Commission Act in the moratory section, thus making the Federal Trade Commission Act applicable to the insurance business, along with

The first section of the Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "Continued regulation" again conveys the idea that Congress did not intend to give anything to the States that they did not [fol. 111] already possess. Silence on the part of Congress was not to be construed as imposing any barrier to State regulation. That is not to say, however, that there were to be no *other* barriers to or limitations upon State regulation: areas in which the States could never regulate were not dealt with one way or the other.

In construing the meaning of this section, it is to be borne in mind that under the commerce clause of the Federal Constitution Congress not only has exclusive power to regulate interstate commerce but in exercising that power can even regulate *intrastate* activities which affect interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). When Congress enters this intermediate zone and legislates fully on a given subject, the Federal statute, "*ipso facto*, supersedes existing state legislation on the same subject." *Southern Ry. Co.* v. *R. R. Comm., Indiana*, 236 U.S. 439, 446 (1915).

The first section must therefore mean that the continued regulation and taxation by the States of the business of insurance *to the limits of their constitutional power* is in the public interest. Certainly the States lack the power to tax or regulate purely interstate activities of insurance companies. It can only be that the section provides that State authority over *intra*state insurance business that might affect interstate insurance business could not be disturbed by Federal legislation which did not specifically mention insurance.

[fol. 112] We now approach the determination of the proper construction of the crucial second section of the

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the Sherman and Clayton Acts, after 1947. No opposition to this proposal was voiced on the floor. The conference committee adopted the suggestion, with the result that the Federal Trade Commission Act was to apply to the business of insurance upon lapse of the moratorium.

McCarran-Ferguson Act. Subsection (a) thereof makes the business of insurance and everyone engaged therein "subject to State laws relating to the regulation or taxation of such business." This is a clear pronouncement that the *South-Eastern Underwriters* case does not dislodge State regulation of insurance.

The second section goes on to provide in subsection (b):

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance: * * *

Obviously, this does not purport to give the States the power to legislate outside their jurisdiction. Nor does it interfere in any way with Federal laws covering interstate commerce over which the States could not ever claim jurisdiction, e.g., the postal statutes. See *United States v. Sylvanus*, 192 F.2d 96, 100 (7th Cir. 1951), *cert. denied* 342 U.S. 943 (1952). Such laws cannot impair or supersede State laws, for they do not relate to the same channels of commerce. And, under the terms of the Act, they become inoperative only if and to the extent that they impair, invalidate, or supersede State laws. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413 (1954).

[fol. 113] Section 2(b) continues:

Provided, That after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Even without such a proviso the Federal Trade Commission Act would have been applicable to those aspects of the business of insurance which are exclusively in interstate commerce, for that area was never reached by State law. They could not, therefore, be "regulated by State law." Moreover, if this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance. It is the office of a proviso "to except something from the operative effect or to qualify or restrain the generality of the substantive enactment to which it is attached." *Cox v. Hart*, 260 U.S. 427, 435 (1922).

The proviso in the McCarran-Ferguson Act must therefore make the Federal Trade Commission Act an exception to the rule that no Federal law not relating specifically to insurance may supersede a State law enacted for the purpose of regulating the business of insurance. It must have been contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof. In its application to the interstate phase of a transaction which cannot be regulated by State law, for example, the Federal law in one sense would [fol. 114] supersede a State law covering the same subject matter in a different and local phase of the transaction.

The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the State in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

We observe that Section 3(a) of the McCarran-Ferguson Act is a moratory clause suspending the application of the Federal Trade Commission, Sherman, Clayton, and Robinson-Patman Acts to the business of insurance for nearly three years. If those statutes were not to "apply *to the business of insurance* or *to acts in the conduct thereof*" until January 1, 1948, we think it logically follows that they were to apply to that business and to those acts after the prescribed date. Thus this subsection, as well as Section 2(b), is inconsistent with any notion that the Commis- [fol. 115] sion's jurisdiction over the interstate aspects of the insurance business was repealed.

In withdrawing Federal jurisdiction under the Federal Trade Commission, Sherman, Clayton and Robinson-Patman Acts over the business of insurance for nearly three years, Congress apparently was attempting to eliminate arguments by insurance companies that Federal regulation alone was adequate and that State regulations were burdening interstate commerce. Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

Since the Court in the *South-Eastern Underwriters* case had said that insurance sold by a company in one State to a customer in another State was in interstate commerce, this type of transaction was subject to the jurisdiction of the Commission. During the moratorium, Congress intended that the Commission not exercise its jurisdiction. After that period the Federal State Commission Act was again to apply, to the extent that the business of insurance was not regulated by State law. Since the States were given no new jurisdiction, State law could regulate the business of insurance only to the extent possible before the *South-Eastern Underwriters decision.* And, as the Court recognized in that case, there were elements of interstate trans- [fol. 116] actions which the States could not regulate.[4]

The legislative history of the McCarran-Ferguson Act supports the foregoing conclusion. We believe this legislative history shows plainly that in enacting that measure Congress was concerned only with ensuring that State laws regulating the business of insurance should not be superseded in the zone of "affecting interstate commerce" by Federal legislation not expressly relating to insurance.

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[4] "The power granted to Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." 322 U.S. at 552.

Thus we find in the reports of the committees of both Houses of Congress this statement:

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case,* with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee be- [fol. 117] lieves there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case,* will subject insurance executives to both civil and criminal actions for misappropriation of company funds. [Sen. Rep. No. 20, 79th Cong., 1st Sess., 1-2; H.R. Rep. No. 143, 79th Cong., 1st Sess, 2]

But authority to regulate the interstate aspects of the business of insurance was to remain with the Federal Government, as can be seen from the following statement in the House Committee report, which was quoted with approval by Senator McCarran in floor debate on the bill (91 Cong. Rec. 1443);

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance,

in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), *and Connecticut* [fol. 118] *General Insurance Co.* v. *Johnson* (303 U.S. 277) * * *. [H.R. Rep. 143 79th Cong., 1st Sess., 3.]

The three cases last cited in the foregoing excerpt all hold that a State's power to tax insurance activities is limited to transactions occuring within its boundaries. We would be hard put to account for the reference to these decisions if the purpose of the McCarran-Ferguson Act were to substitute an exclusive State power for the Federal Trade Commission's jurisdiction over the interstate aspects of the insurance business.

We are confirmed in our belief to the contrary by the decision of *United States* v. *Sylvanus*, 192 F.2d 96 (7th Cir. 1951), *cert. denied* 342 U.S. 943 (1952), wherein the Court held that the McCarran-Ferguson Act did not abolish Federal jurisdiction under the postal laws to prosecute for mail fraud committed in the sale of insurance in a State having its own statutes regulating that business. The Court carefully distinguished the interstate and *intra*state aspect of the defendant's deceptive practices:

> It can not properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and [fol. 119] regulate the company's insurance business in Illinois, but goes to the use of the mails, over which the Congress has, by the Constitution, paramount power and authority. It matters not that the alleged fraudulent actors might be prosecuted under the law of Illinois. The indictment charges simply that acts of deception amounting to a scheme to defraud have been committed by defendants, in conducting their authorized business, and that defendants have availed themselves of the mails in execution or attempted execution of that scheme. It is immaterial that the fraudulent plan itself is outside the jurisdiction of Congress, *Badders* v. *U.S.*, 240 U.S. 391 * * *, or that the

scheme charged involved a transaction forbidden by the laws of the state. *O'Hara* v. *U.S.*, 6 Cir., 129 F. 551.

We conclude, then, that it was not the intent of the Congress, by its passage of the McCarran Act, to surrender control of the use of the mails or to cease to authorize the federal Courts to determine whether the mails have been utilized in attempted execution of a scheme to defraud and that the District Court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment. [192 F.2d at 100.]

Unlike the Federal Trade Commission Act, the postal laws were not expressly brought by the McCarran-Ferguson Act to bear on the business of insurance. Indeed, that statute declares that *no* Act of Congress not specifically relating to the business of insurance shall be construed to invalidate, impair, or supersede any State law regulating that business. Yet in the *Sylvanus* decision, *supra*, the Court held that a postal statute banning a course [fol. 120] of conduct which in its *intra*state aspects constituted a State offense was unaffected by the McCarran-Ferguson Act.

All the more, then, under the Federal Trade Commission Act, which the McCarran-Ferguson Act made applicable to the business of insurance, there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation "to the extent that such business is not regulated by State law" is inoperative.

A State can revoke an insurance corporation's charter or license, thus affecting interstate commerce to some degree. To the extent necessary to enable it effectively to exercise its police power, the State can take action having consequences in other jurisdictions, and the Federal Trade Commission could not prohibit such regulation. And the text and history of the McCarran-Ferguson Act leave no doubt that the power of the States to tax, or to fix rates for, insurance companies doing business within their territories was in no way to be invalidated, impaired, or superseded by Federal law. However, as we have already said, our preceeding to abate deceptive practices by such

companies does not impinge on those State functions, and we do not believe that the Federal Trade Commission Act, when read in conjuction with the McCarran-Ferguson Act, can be properly interpreted to interfere with the taxing or rate-fixing powers.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter [fol. 121] aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413 (1954).

The principle that the Commission may proceed against a practice that may simultaneously be the object of State regulation is one of long standing.[5] Thus the Commission's orders prohibiting the interstate shipment of lottery devices to be used in selling merchandise have been universally upheld on judicial review despite the fact that such devices are not put to their intended use until they have left the channels of interstate commerce (just as the respondent's brochures are not displayed for sales purposes until they have come to rest in the hands of respondent's agent within a State). See *Seymour Sales Co.* v. *FTC*, 216 F. 2d 633, 635-6, (D. C. Cir. 1954), *cert. denied* 348 U. S. 928 (1955), and cases therein cited. The idea of a field of enforcement divided between Federal and State Governments is embedded in a number of statutes, in addition to the McCarran-Ferguson Act. Examples of these are Acts dealing with the sale of liquor (the Wilson Act, 26 Stat. 313, and the Webb-Kenyon Act, 33 Stat. 699), convict-

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[5] As recently as April 2, 1955, the Supreme Court of the United States reaffirmed this principles in *Pennsylvania* v. *Nelson*, 350 U.S. . . ., declaring that where the Federal Government had occupied the field of protecting against sedition, States were not thereby prevented "from prosecuting where the same act constitutes both a Federal and a State offense under the police power * * *."

[fol. 122] made goods (the Hawes-Cooper Act, 45 Stat. 1084, and the Ashurst-Sommers Act, 49 Stat. 494), oleomargarine (32 Stat. 193), diseased plants (44 Stat. 98), black bass (64 Stat. 845), whaling (49 Stat. 1246), prizefight films (54 Stat. 686), and the Federal Power Act (49 Stat. 838).

In view of our foregoing consideration of the terms, legislative history, and judicial interpretation of the McCarron-Ferguson Act, we do not think the statute admits of the construction placed on it by the hearing examiner.

Respondent points out that it did not send its advertising materials to sales prospects but mailed them to its own agents in various States for local use, and that hence its advertising occurred only in *intra*state commerce. We consider such an analysis fictitious and unrealistic. Respondent's annual premium collections on health-and-accident insurance sold by its agents throughout fourteen States amount to about $2,750,000. It employs an indisputable channels of interstate commerce, the mails, for sending advertising materials to its agents, receiving applications for insurance from them, and forwarding the issued policies to them for delivery to policyholders. The actual interview of a prospect, though it necessarily happens at a fixed geographical point within some State, cannot be isolated from the remainder of respondent's established course of dealing. By preparing its brochures and furnishing them, by mail, its agents in various States for their use in sales presentations, respondent engages in an interstate commercial practice that must be viewed as a whole and not [fol. 123] compartmentalized. *Consolidated Manufacturing Co.* v. *FTC*, 199 F. 2d 417, 418 (4th Cir. 1952).

Under the Federal Trade Commission Act, one who sells through agents in other than his home State must answer for deceptive advertising which he supplies to his agents, even though such representations are by necessity conveyed to the public within a particular State. *General Motors Co.* v. *FTC*, 114 F.2d 33, 36 (2d Cir. 1940); *Ford Motor Co.* v. *FTC*, 120 F.2d 175, 183 (6th Cir. 1941).

The Commission is accordingly of the opinion that the hearing examiner erred in not holding that the Commission had jurisdiction over such of respondent's practices in interstate commerce as might be found to be unfair or

deceptive, irrespective of the existence of State statutes applicable to the *intra*state elements of such practices.

We turn now to the appeal from the hearing examiner's dismissal of the complaint for lack of substantial evidence.

Respondent was charged with falsely representing, among other things, that the indemnification provided by its policies might continue to the age of sixty, or for an indefinite period, at the option of the insured. The sole evidence adduced on this allegation consists of brochures which states as follows, or similarly:

No Age Provision terminating or reducing benefits because of increasing age,
and—
Policy Form ASA Issued to Men and Women, aged 18 to 60.

Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health. [fol. 124] We do not believe that these two statements, separately or together, particularly in the absence of assertions of lifetime duration or any other definite period of coverage, can be reasonably read as meaning more than that respondent's policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified. It is true that respondent's accident-and-health policies are term contracts renewable at the option of the company on the premium date. However, nothing to the contrary is expressed or reasonably implied in the aforequoted statements, and we therefore discern therein no capacity or tendency to deceive. We uphold the hearing examiner's dismissal of the complaint in this respect.

Respondent was next charged with falsely representing that its policies provide indemnification for all illness or accidents. To prove this charge there were introduced respondent's brochures containing broad, general representations, of which the following are typical:

Confining Illness Indemnity $ Per Month for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. (Up to two months full benefits for non-confining illness:)

Total Accident Disability ..... per month for loss of time from accidental injury beginning with the first day of disability and continuing for life if you are totally disabled.

Partial Accident Disability ..... per month for loss of time from accidental injury, beginning with the first day and continuing for period of partial disability (limit 3 months).

[fol. 125] In conjunction with the foregoing there were introduced copies of respondent's policies containing conditions substantially limited the illness and accident benefits advertised. The examiner found that the charges in this regard were not supported by substantial evidence, not for the reason that the representations were not proved nor that the terms of the policies did not materially limit the advertised benefits, but for a number of other reasons which are in our judgment unsound and contrary to controlling precedent.

The examiner attached great weight to the fact that the brochures in question included a statement to the effect that benefits therein described "are subject to the terms of the policy issued." We are not in accord with the examiner's view that such a notice is sufficient to correct erroneous impressions given by the representations "Confining Illness Indemnity—$ ..... per month for loss of time from illness, beginning on the fourth day and continuing for one year for each illness," or "Total Accident Disability—$ ..... per month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled." Respondent's vice-president, W. C. Murphy, testified that an agent's sales kit consisted of a sales brochures, a rate book, "and, I guess, a fountain pen," and that respondent's agents are not required to carry sample policies with them. These sales brochures consist of an application form and a receipt form for the initial payment. These facts lead us to believe that many applicants do not see sample policies before executing formal applications for respondent's insurance. We consider this circumstance significant. In the context of the sales presentation, in the course of [fol. 126] which the prospect has little or no opportunity

to inspect a sample policy, the sales brochure, we are convinced, clearly has the tendency and capacity of misleading as to the extent of coverage. We disagree with the examiner's statement that if the prospect would read the entire page he would see that all benefits are subject to the terms of the policy and then if interested he would naturally inquire of the agent as to the terms. Rather it is our view that the brochure functions as a self-contained piece of advertising that of itself is likely to induce a prospect to purchase respondent's insurance.

Furthermore, we do not believe that the prospective purchaser is under any obligation to investigate the extent to which respondent's unrestricted representations of coverage for illness or accidents are untrue. "Under repeated decisions, the purchaser is entitled to rely upon the respresentations made. He need not distrust what is told him. * * * It goes without saying almost that it is extremely difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point." *United States* v. *Sylvanus*, 192 F.2d 96, 105 (7th Cir. 1951) *cert. denied* 342 U.S. 943 (1952).

If the busy or careless businessman is entitled to protection from deceptive printed forms, even though an attentive, careful person would not be deceived thereby, *Independent Directory Corp.* v. *FTC*, 188 F. 2d 468, 470, 471 (2d Cir. 1951), it does not devolve upon respondent's prospects to ascertain the extent to which respondent's advertising may or may not exaggerate or falsify. The Federal Trade Commission Act is violated if the first contact or interview is secured by deception even though the true facts [fol. 127] are made known to the purchaser before he enters into the contract to purchase. *Carter Products, Inc.* v. *FTC*, 186 F. 2d 821, 824 (7th Cir. 1951).

Another questionable premise in the examiner's reasoning is that "any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence." Apart from the fact that the Federal Trade Commission has the duty to protect not only the "reasonably intelligent" but

also the ignorant, the unthinking, the credulous, and the inexperienced, *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F. 2d 676, 679 (2d Cir. 1944), we question whether the fact asserted by the examiner to be common knowledge—if it be a fact—is generally known even to the "reasonably intelligent." It is certainly not beyond the realm of actuarial conceivability, not to say possibility, that in these United States in the mid-twentieth century insurance could be written which would afford protection against all illness and all accidents.

The examiner noted that no proof of actual deception was offered and declared, "Absence of such evidence justifies a presumption that none existed." Despite his disclaimer of reliance on such a presumption, it evidently was one of the considerations impelling him to dismiss these charges. This is manifest error. It was firmly established long since that actual deception of the public need not be shown in Federal Trade Commission proceedings and that representations having a capacity to deceive are unlawful. [fol. 128] *Charles of the Ritz Dist. Corp.* v. *FTC*, *supra* 143 F. 2d at 680.

The initial decision devotes considerable space to three decisions of the Supreme Court of Mississippi, all involving private litigation, in which that Court accorded a more liberal interpretation to the conditions contained in accident and health policies similar to those here than their literal intendment would seem to justify. He concludes from these holdings that the conditions are not so burdensome as to render untrue respondent's broad representations.

The decisional law of a single State is no sure guide to the interpretations that other States may place on respondent's policies. What is more, the fact that a policyholder may eventually prevail over a respondent in an appeal from a jury trial does not rectify the deception inhering in the sales practices whereby he was induced to purchase the insurance. He may be discouraged by the literal terms of the policy from seeking legal redress. We do not consider that the fact that if he perserver-s to his State Supreme Court he may succeed in winning an interpretation of respondent's policy more favorable to him than the language literally warrants is a substitute for the protection assured him by the Federal Trade Commission Act.

The hearing examiner discusses at some length the reasonableness of the restrictions that respondent attaches to its illness and accident benefits. This is, of course, not germane to the question of whether respondent's representations tend to deceive and mislead.

There remain for discussion two other charges dismissed by the examiner. It was alleged that respondent had rep- [fol. 129] resented its hospital-and-surgical-expense policy to provide for the payment of $150 for any operation serious enough to justify such a surgeon's fee. The evidence shows that respondent disseminates a one-page advertisement which, among other things, states that the policy provides for—

Surgery from $3.00 to $150.00 $150.00
depending on seriousness of operation.

The policy to which this refers sets out a long schedule of the various amounts payable for specified types of surgical operations. Sixty-seven different benefits are enumerated. A mere six of these amount to $150: operations for removal of a portion of the lung, removal of kidney, removal of a portion of the vertebra, removal of entire prostate or thyroid gland, and cutting into the cranial cavity.

Only $25 is allowed for removal of tonsils and adenoids. Appraising this advertisement as it is likely to be read by unsuspecting, incautious members of the purchasing public, we gain the impression that the policy will indemnify up to a maximum sum of $150 for any surgical operation serious enough to cost such an amount. Thus, if a tonsillectomy cost $50, we would think it reasonable to expect that one insured by the policy would be protected to that extent. The advertisement is therefore deceptive and misleading in that it promises benefits which the policy does not corroborate.

Lastly, it was charged that respondent falsely represented that its hospital-and-surgical-expense policy would pay maternity benefits in addition to room service and hospital expense.

[fol. 130] On the advertisements for this type of policy, following a listing of the benefits of room service, hospital

expense, and surgery, there is shown as one of the "Additional Benefits":

Maternity: Up to $ after insurance has been in force for 10 months.

We would have difficulty in reading the foregoing as anything less than a representation that the maternity benefit is *in addition* to the other benefi-s provided by the policy. In actuality, however, the maternity benefit is provided for in a rider wherein it is specified that the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital service." Thus, far from being an *additional* benefit, it is only a *substitute*, benefit, and the representation in regard thereto is hence at material variance with the facts. We believe that the type of misconception that such advertising as this can engender in the minds of couples seeking to provide financially for the birth of children is especially vicious. There can be no question that it is a patent deception to describe as "additional" a benefit which excludes participation in other benefits, directly following a broad representation that hospital and surgical expenses are covered.

In view of the foregoing, the initial decision is vacated and set aside, and our findings as to the facts, made on consideration of the whole record including the initial decision, and conclusions and order to cease and desist will be issued in lieu thereof.

Commissioners Gwynne and Mason dissent.

April 24, 1956.

[fol. 131] JOINT DISSENTING OPINION OF CHAIRMAN GWYNNE AND COMMISSIONER MASON—April 24, 1956

We are unable to agree with the views expressed in the majority opinion. The reasons for our dissent are: first, the opinion completely ignores the intent of Congress in adopting Public Law 15 (McCarran Act); second, it would return the insurance business to the uncertainty and confusion which followed the decision in *U. S.* v. *South-Eastern Underwriters Association*, (1944) 322 U. S. 533. It was

to remove this uncertainty and confusion that the McCarran Act was adopted.

Prior to the decision in the *South-Eastern Underwriters* case, regulation of insurance was recognized as a problem for the respective states. This was partly because the Supreme Court of the United States in a long line of decisions from *Paul* v. *Virginia*, 8 Wall. 168, to *New York Life Insurance Company* v. *Deerlodge County*, 231 U. S. 495, had held that the business of insurance was not commerce.

Although the business of insurance was not subject to regulation under the commerce clause, it was universally recognized as a business affected with a public interest. [fol. 132] Consequently, the states found few obstacles to regulating it to the fullest extent and in the manner the respective legislatures though to be for the public good in their particular states. These laws took the form of determining who should engage in the insurance business within the state boundaries, the terms under which the business might be conducted, regulation as to rates to be charged (even to the extent of fixing them, or permitting representatives of insurance companies to do so under state supervision). The right of the states to levy tax and license fees, even discriminating against foreign insurance corporations, was also recognized. See 44 C.J.S. p. 518; *LaTourette* v. *McMaster, Insurance Commissioner*, 244 U. S. 465.

Had these regulations been directed at the usual industry engaging in interstate commerce, many would have run counter to paramount Federal authority. For example, the many discriminatory taxing programs were not in accord with decisions of the Supreme Court relating to interstate commerce generally. Certain state rate regulations were contrary to the philosophy of Federal antitrust laws. No conflict arose, however, because it had been settled that the business of insurance was not interstate commerce.

This does not mean that the insurance business and the states in regulating it were free from all Federal constitutional and statutory provisions. They were, of course, subject to such constitutional restraints as the due process clause, the exclusive right of Congress to establish post office and post roads [*U.S.* v. *Sylvanus* (1951), 192 F. 2(d) 96] and many others. In fact they were, and still are, sub-

ject to all restraints properly imposed by paramount power, [fol. 133] except as that power elects to exempt them.

In regulating insurance, states act under that great reservoir of power known as the police power. There are, of course, jurisdictional limitations on the exercise of that power. It may be directed only at activities within the state. It has never been claimed that the states may operate directly in that phase of regulation known as the flow of commerce. Nor by no stretch of the imagination can it be said that the McCarran Act intended to give any such power.

In 1944 in the *South-Eastern Underwriters* case, the Court reversed its holdings of 75 years standing and concluded that the business of insurance was interstate commerce. It was also specifically held that it was subject to the Sherman Act.

The immediate effect of this decision was to bring the business of insurance and the laws of the various states regulating it under the paramount power of the Federal antitrust laws. Because of the inconsistency previously referred to, this created considerable uncertainty and confusion in the insurance field, of which Congress took immediate cognizance.

Confronted with this emergency, Congress had several alternatives:

(1) It might take no action and allow the antitrust statutes to be superimposed on the existing state systems of regulation and taxation. This would create great confusion as to the legal boundaries between Federal and state control, which confusion could only be lessened, bit by bit, as Courts made decisions on specific problems.

[fol. 134] (2) It might write a comprehensive law for Federal regulation of insurance,—a law which would provide new methods for many matters theretofore handled by the states, and which might make such changes in the application of existing antitrust laws to the peculiar business of insurance as experience had indicated might be necessary.

(3) It might recognize and continue existing or future state regulation by removing the obstacles to that regulation which had been called into being by the decision that the business of insurance was interstate commerce.

Congress chose the latter course and expressed its choice by the adoption of the McCarran Act. The general purpose of this legislation was to meet the problems created by the *South-Eastern Underwriters* case. The plan for meeting this problem is clearly expressed in the law. It may be reduced to a simple statement as follows: The Congress declares that the continued regulation and taxation by the states of the business of insurance is in the public interest and shall remain, with two exceptions, namely, (1) this Act shall not render the Sherman Act inapplicable to agreements to or acts of boycott, coercion or intimidation, and (2) that after June 30, 1948 (but not before), the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance, but only to the extent that such business is not regulated by state law. Thus, in any case, the jurisdictional question may be quickly and certainly resolved by finding the answer to a simple question, namely, is there state regulation to meet the particular problem presented by the facts. [fol. 135] That this is the proper interpretation of the law is indicated by the following: (1) the wording of the statute itself, (2) the legislative history, (3) events which transpired immediately following passage of the law, (4) decisions of the Courts interpreting the McCarran Act.

It is, of course, well settled that the power of Congress under the commerce clause is broad and is also paramount. It includes the right to regulate, or even prohibit, the flow of things across state lines, the right to regulate the instrumentalities by which commerce is carried on, and also the right to regulate activities, wholly within the state, which affect interstate commerce. The power to regulate the so-called flow of commerce covers every species of movement of persons and things, whether for profit or not; every species of communication; every species of transmission of intelligence, whether for commercial purposes or otherwise; every species of commercial negotiations, which, as shown by the established course of business, will involve sooner or later an act of transportation of persons or things, or the flow of services or power across state lines. (See the *Analysis of the United States Constitution* as prepared by the Legislative Reference Service, Library of Congress, and cases cited.)

The great power of Congress to regulate matters wholly within the state but affecting interstate commerce is well settled in *U.S.* v. *Darby* (1944), 312 U.S. 100, in which the Court held that the payment of substandard wages wholly within a state affected commerce and could be prohibited.

Going with these great powers, and a necessary, corollary to them, is the right of Congress to determine where and when these powers are to be used. Thus, it may decline [fol. 136] to exercise certain powers; and it may condition its refusal to exercise them on the fact of regulation by the states.

This is exactly what Congress was seeking to do in the McCarran Act. Much of the fallacy of the reasoning in the majority opinion springs from a refusal to recognize this obvious fact. The majority would decide the issues in this case by applying principles which admittedly were applicable following the decision in the *South-Eastern Underwriters* case. They conveniently ignore the fact that the purpose of the McCarran Act was to prevent the application of these principles.

For convenience, and before discussing the law in detail, the McCarran Act is set out here in full text:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, [fol. 137] or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the

Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3 (a) Until January 1, 1948 the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the ap-lication to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

[fol. 138] "Sec. 5. As used in this Act, the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

"Sec. 6. If any provision of this Act, or the application of such provision to any person, or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected."

While the title to a statute is not, strictly speaking, a part of the law, nevertheless, it is interesting to note that the title is "To express the intent of the Congress with reference to the regulation of the business of insurance."

Immediately after the enacting clause, occurs the following:

"That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, • • •."

This is a clear and positive declaration of Congressional policy, which cannot be read out of the law. It expressly points out the character of state regulation and taxation which is in the public interest. It is the "continued regulation". In the past, the states have done all the regulating so far as the commerce clause was concerned. That was to carry on, with the exceptions expressly provided for, and which will be discussed hereafter. There is nothing in this statement or in the entire Act which justifies the [fol. 139] interpretation that the regulation contemplated was to continue only by the grace of the Federal Trade Commission.

Speaking on this subject in *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, the Supreme Court of the United States had this to say:

"Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several States in these respects.

"Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes enacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

* * * * * * *

[fol. 140] "* * * it clearly put the full weight of its power behind existing and future State legislation to sustain it

from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

That a declaration of policy by Congress will be given weight by the Courts is well settled. See *U.S.* v. *Darby*, 312 U.S. 100.

Continuing, the statute further provides:

"* * * and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Some of the powers granted to Congress by the Constitution are either expressly, or by necessary implication, exclusive and cannot be exercised by the states, even though Congress has taken no action thereon and has remained silent on the subject. The power to declare war is an example. Under the commerce clause, the line between Federal and state authority cannot be so precisely drawn. This is particularly true in the field of state activities which may or may not have a prohibited effect on interstate commerce. The supremacy of the Congress, when properly exercised in this field, is clearly recognized. A difficult problem arises where the powers of Congress are allowed to lie dormant, that is, when Congress is silent on a given subject. Should its silence be construed as a reservation of its power, which will bar any state regulation; or will it be considered as consent to state action until Congress has spoken? This question has arisen many times and has re- [fol. 141] ceived a variety of answers, depending upon the circumstances of the particular case.

The question of silence of Congress is not involved in this case. The Congress evidently thought it might be raised, and intended to make its position clear. The inclusion of the above quoted clause indicates how thoroughly Congress has considered this matter and how determined it was to remove all possible barriers to its declared policy of state regulation.

Section 2(a) provides:

"The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

When used in this connection, "subject to" means "subordinate to", "obedient to". *Shay* v. *Roth*, Calif. (1923), 221 P. 967; *Davies* v. *City of Los Angeles* (1890), 24 P. 771.

In a long line of cases from *Paul* v. *Virginia* to *New York Life Insurance Co.* v. *Deerlodge County* insurance companies have challenged their subjection to state regulatory or taxing laws. The Supreme Court, however, consistently rejected this defense on the theory that the business of insurance was not interstate commerce.

When the Supreme Court in *South-Eastern Underwriters* reversed its decision, this defense became good, and the business of insurance was subject to state law, only to the [fol. 142] extent that such laws did not interfere with paramount Federal power under the commerce clause. In Section 2(a) Congress clearly showed its intention to remove the barrier of its own paramount power and thus make the business of insurance subject to state laws, notwithstanding the decision in *South-Eastern Underwriters*.

Section 2(b) provides:

"No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Stronger language to give state laws "top billing" could hardly be imagined. The clause beginning with "unless" is particularly significant. While Congress had not legislated directly concerning the insurance business, it had done so with reference generally to interstate commerce and with reference to persons and corporations engaged therein. The antitrust laws are examples. Congress in Sec. 2(b) said none of these laws (except as indicated in the proviso) shall apply to the business of insurance, unless such law specifically relate to insurance. It recognized:

first, that insurance has some problems peculiar to that [fol. 143] industry; second, that many states had adopted regulatory systems tailored to the insurance business in their boundaries; and, third, that any attempt to superimpose the general laws regulating commerce on these systems would create great confusion.

The proviso applies only to the provision immediately preceding it. *Dahlberg* v. *Young* (1950) Minnesota 42 N.W.2nd 570. It provides an exception to the general statement preceding it, which exception is that the three Acts named therein shall, after January 1, 1948, apply to the business of insurance,—but only to the extent that such business is not regulated by state law. This proviso was adopted to answer criticism of the original House bills, which provided simply that certain laws shall not apply to the business of insurance or to acts in the conduct of that business. In other words, in the original bills, the House proposed to wash its hands of the whole matter, regardless of whether any particular state had provided regulation. The final version, which was accepted by the House without objection, simply conditioned Federal withdrawal from the field on the fact that the particular state had provided regulatory laws. In view of the strong stand taken by the House in favor of continued state regulation, it does not seem reasonable that it would have accepted, without question, this final version, if (as claimed by the majority) such version set up concurrent jurisdiction, with the Federal power paramount to the state power.

What Congress had in mind is further illustrated by Section 3(a) which provides that until January 1, 1948, the antitrust laws should in no event apply to the business of insurance. The majority claim that the purpose of this moratorium was to give the states time "in which to design [fol. 144] a reasonable area of state police power. Beyond that reasonable area, states could not go."

That view is based on a misconception of the state police power. That power was reserved to the states by the Constitution. It is not up to the Congress to determine whether it is exercised reasonably. Whether exercised reasonably or not, this power is subject, at all times, to the paramount power of the Federal government under the commerce clause and other constitutional provisions not involved here; and in case of conflict, the question is resolved by

the Federal government and not by the states. The whole purpose of the McCarran Act was to express the Congressional intent that the barrier of paramount power under the commerce clause was to be removed in the event that the states did adopt regulatory laws. The purpose of the moratorium was to give the states time to adopt such laws. Failing to do so in any particular area, the Federal power would still remain.

Section 3(b) provides:

"Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation."

The *South-Eastern Underwriters* case involved a boycott by a number of insurance companies operating in several states. The Congress concluded that the paramount power of the Federal government in such cases should remain. [fol. 145] The fact that Section 3(b) is in the law is a strong argument against the interpretation urged by the majority. If the McCarran Act left the Federal government and the states with concurrent powers (in which the Federal power would necessarily be paramount), why was it necessary to include Section 3(b)?

The legislative history of the McCarran Act strongly supports our interpretation of the jurisdictional feature.

While the *South-Eastern Underwriters case* was pending in the Supreme Court, bills were introduced in the House, providing for the unqualified exemption of insurance from the Sherman and Clayton Acts. Thereafter, and after considering suggestions by representatives of the National Association of State Insurance Commissioners, and also by representatives of the insurance industry, bills were introduced both in the House and Senate, which bills, with some minor modification, eventually became the McCarran Act. In some respects, these bills further limited the control of Congress, as, for example, in the inclusion of the Federal Trade Commission Act. In other respects, the Federal authority was broadened to retain control, in all cases where state regulation did not exist. The law, as finally passed, is clear on this point; regulation shall remain in the states with the exception of the boycott situation, and with the

exception of those situations where a state either did not or could not adopt the necessary regulations.

There is literally no evidence to the contrary. Note the following excerpts from the Senate debate.

[fol. 146] Senator Murdock:

"And it is intended that on the expiration of the moratorium, the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective, except—."

Senator McCarran:

"Except as the states themselves have provided regulation."

Senator Pepper:

"States may determine whether or not the Sherman and other acts become applicable to the business of insurance?"

Senator McCarran:

"Yes."

What was done after the adoption of the McCarran Act indicates that the persons concerned had no doubt about the meaning of the Act. The National Association of State Insurance Commissioners prepared a model code for the regulation of the insurance business in accordance with the directions of Congress. This code has been adopted by a majority of the State legislatures. Other states have adopted laws which in effect are equivalent.

It is difficult to understand why these actions should have been taken if the parties thereto thought that the net result would leave the law as it was just prior to the McCarran [fol. 147] Act, which is the contention of the majority in this case.

The McCarran Act has been considered in four Federal Court cases. In none of them, did the Court experience any difficulty in determining what the McCarran Act meant. In the Sylvanus case, the Court said:

"It is clear, we think, that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the

regulation and taxation of insurance companies by the several States."

In *Maryland Casualty Company* v. *Cushing* (1953) 347 U.S. 409, the Supreme Court said:

"Even the most cursory reading of the legislative history of his enactment (McCarran Act) makes it clear that its exclusive purpose was to counteract any adverse effect that the Court decision in the South-Eastern Underwriters case might be found to leave on state regulation of insurance."

The Court then quotes from House Report No. 143, 79th Congress, 1st Session, as follows:

"It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision in the South-Eastern Underwriters case."

[fol. 148] A clearer and more concise statement of the extent of the McCarran Act, and also its limitations, could hardly be found.

In *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange* (1950), 181 F. 2d, 174, the Court said:

"The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by Federal legislation relating to interstate commerce. See *Prudential Insurance Co.* v. *Benjamin,* supra, p. 429 of 328 U.S.

"In view of what was said by the Supreme Court about the effect of the McCarran Act in the *Prudential Insurance Co.* case and the case of *Robertson* v. *People of State of Calif.,* 328 U.S. 440, 449, 461, there is no need for discussing the validity or effectiveness of the McCarran Act. A ruling that it is invalid or ineffectual, we think, would be absurd."

The *Prudential Insurance Company* case is directly in point. There, the Prudential company challenged a statute of South Carolina which imposed on foreign insurance companies as a condition of doing business within the state, an annual tax of 3% of premiums on business done in the state without reference to transactions, whether interstate or

local. It should be noted that the case did not involve purely intrastate matters, which the majority claim is the limit of the McCarran Act's effectiveness. This state tax was clearly discriminatory, affected interstate commerce, and would ordinarily have been stricken down. However, it was [fol. 149] not, and the reason given was that a state tax or regulation discriminating against interstate commerce which would be invalid under the commerce clause, in the absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. The only difference between the Prudential case and the one at bar is that the former deals with state taxation and the latter with state regulation. The McCarran Act covers both.

The majority view of jurisdiction under the McCarran Act is entirely different. They say the McCarran Act "was designed to permit the states to regulate, *in the traditional manner*, the business of insurance." They obviously do not mean they are permitted to regulate it as they did prior to the *South Eastern Underwriters* Case, because their decision in this case asserts the paramount power of Federal laws over those of the states.

No law of Congress was necessary to give the states a right to carry on activities within their own borders, designed to regulate insurance. That is covered under the police power, guaranteed to the states by the Constitution. Just as Congress with reference to powers under the commerce clause, state legislatures may exercise these powers or not as they choose, subject only to their own and the Federal Constitution. The real problems arise when the exercise of these powers come in conflict with the commerce clause. There, the Federal power is paramount. Parker v. Brown, 317 U.S. 34. *Southern Railway Company* v. *Railroad Comm. of Indiana*, 236 U.S. 439. But, as was pointed out in the latter case, Congress could have circumscribed its regulation so as to occupy a limited field." This intention to occupy a limited field is the very essence of the McCarran Act.

[fol. 150] Just how far the majority would go in disregarding this intention is well illustrated in the case at bar. For example, suppose a state having the model code should decide that certain advertising disseminated therein did not violate the law. Nevertheless, the Federal Trade Commission asserting its paramount power to regulate the flow

of commerce into the state comes to an opposite conclusion. Or suppose the state officials held the advertising was illegal, while the Federal Trade Commission held to the contrary. The majority decision does not recognize state regulation; it destroys it.

The cases cited do not support the majority position. Of course, the Federal government, under the commerce clause, may regulate the flow of lottery devices into a state, regardless of state laws on the subject. The reason is that Congress has never enacted in the lottery field an equivalent of the McCarran Act. It requires a violent stretching of the imagination to find any support in the *Sylvanus* decision. There, the defendant was indicted under a statute prohibiting the use of the mails to defraud. The power of Congress in mail fraud matters does not depend on interstate commerce; it is based on the exclusive Constitutional right to control the mails. Prior to the South-Eastern Underwriters case, immediately after and prior to the McCarran Act, and under the McCarran Act, the result would have been the same. As the Court well expressed it, "This indictment does not have to do with the regulation of the insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent [fol. 151] deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails over which Congress has by the Constitution paramount power and authority."

The McCarran Act arrests the overriding power of the Federal government under the commerce clause as it affects insurance, where the states have regulatory laws. Nowhere does the Act express any intention of doing the same with the power to regulate the mails, the power to enforce due process, or the many other constitutional powers.

To us, the conclusion is inescapable that under the majority view, the McCarran Act accomplished nothing. Courts will not presume that a statute was meant to have no effect. On the contrary, it will be presumed that the

legislative body intended to make some change in existing laws, particularly where the whole history shows they intended to remedy what they thought was an existing evil. This rule is usually applied in situations where the overall intent is not clearly expressed in clear language.

Here, the majority would reverse these well-known rules of statutory construction in order to prove that Congress accomplished nothing. They, in effect, rewrite portions of the McCarran Act as follows:

That the Congress hereby declares that paramount regulation and taxation by the Federal government [fol. 152] of the business of insurance, rather than the continued regulation and taxation thereof by the several states, is in the public interest.

Section 2 (a). The business of insurance, and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business, only to the extent that such laws do not conflict with the paramount Federal power under the commerce clause.

Section 2 (b). Any act of Congress, whether it specially relate to the business of insurance or not, shall be construed to invalidate, impair or suspend any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, whenever the state law conflicts with such act of Congress. The Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance regardless of any state regulation on the subject.

II

Our second objection to the majority opinion is that it would return the insurance business to the confusion into which it was plunged by the South-Eastern Underwriters decision. The nature and extent of that confusion was well expressed by the dissenting Judges. The late Mr. Chief Justice Stone said:

[fol. 153] " * * And in view of the broad powers of the federal government to regulate matters which, though not

themselves commerce, nevertheless affect interstate commerce, *Wickard* v. *Filburn*, 317 U.S. Ill.; *Polish Alliance* v. *Labor Board, supra*, there can be no doubt of the power of Congress if it so desires to regulate many aspects of the insurance business mentioned in this indictment.

"But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in or affecting interstate commerce, to be applied by the Courts to the insurance business as best they may.

"In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the court's opinion. The Government admits that statutes of at least five states [fol. 154] will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion."

The late Mr. Justice Jackson said:

"The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of

the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.

"The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. * * *

"It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation [fol. 155] of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.

"Also it requires sanctions for obedience far more effective than the $5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of permission to do busines therein—a drastic sanction that really commands respect."

The accident and health insurance industry is a large and important one; yet, it is a small part of the business of insurance. This case, under Section 5 of the Federal Trade Commission Act, involves only a matter of advertising. But Section 5 is a comprehensive section which covers many things, such as combinations and restraints under the Sherman Act and at common law, price fixing, and many

other things which the Federal Trade Commission might hold to be unfair methods of competition.

As has been frequently said, insurance is a business effected with a public interest. Many years of regulation in 48 states have developed the fact that insurance has some problems peculiar to the business. One is the necessity of maintaining an industry whose financial ability to meet obligations accruing many years in the future will not be undermined by short term considerations. Consequently, the states have asserted their right to regulate the financial polices of the companies licensed to do business [fol. 156] in their states, to demand the deposit of certain reserves, to regulate and even limit competition, to fix rates, etc. Some of the regulations permit, or even require, cooperative action among insurance companies which could easily be contrary to the philosophy of the Federal anti-trust laws.

In this connection, the majority opinion says:

"However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those state functions, and we do not believe that the Federal Trade Commission Act can be properly interpreted to interfere with the taxing or rate-fixing powers."

We have already called attention to the breadth and extent of the Federal power to regulate the flow of commerce and also to the extensive power under the "affecting interstate commerce" theory to regulate matters entirely within the state which were once thought to be far removed from Federal authority. In South-Eastern Underwriters, the Supreme Court called attention to the many activities of a modern insurance company which involved or affected interstate commerce as we now know it. Such activities are necessarily centered in a home office. From there and to there, flows a constant stream of advertising brochures, policies, applications, statements, rate schedules, directions, etc. These have to do with all the activities of the insurance business and are not restricted to advertising.

In this case, jurisdiction is based on the admitted fact that the respondent sent bundles of advertising matter [fol. 157] into states where it was licensed to do busi-

ness. Actual dissemination of the advertising occurred entirely within the state. Except for the McCarran Act, it is clear this limited proof would sustain paramount Federal jurisdiction. Just how the majority arrive at the conclusion that similar proof would not sustain Federal jurisdiction in taxing and rate-making matters is not clear.

In fact, the decision in *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange, supra,* is to the contrary. That case involved an appeal from a summary judgment of dismissal of a treble damage suit. The dismissal was based upon a determination that the fixing of rates by the National Bureau of Casualty Underwriters for casualty insurance written in the State of Arkansas by the members and subscribers of the Bureau is not violative of the Sherman Act, as amended. The Court adopted the findings of the District Court, one of which was:

"3. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act." 85 F. Supp. 961, at p. 964.

The Circuit Court of Appeals affirmed the holding of the District Court that the McCarran Act permitted the State of Arkansas to continue the regulation of insurance in the matter of rate fixing, which regulation, without the McCarran Act, would have violated the Sherman Act.

It is our conclusion that the majority opinion would bring tremendous confusion in the insurance industry and would open the door wide to complete Federal control. We are not discussing the relative merits of Federal versus state control. All we say is that the decision belongs to [fol. 158] Congress and not to a Federal bureau.

The hearing examiner, after applying the jurisdictional tests to which we subscribe, concluded that in all states in which respondent was licensed to do business, except Mississippi, state regulation did exist. The hearing examiner then considered the alleged illegal advertising in Mississippi and concluded that it did not violate the Federal Trade Commission Act.

We have repeatedly pointed out that, under the McCarran Act, the Federal Trade Commission has some juris-

diction in the business of insurance. Within that jurisdiction, and in performance of duties imposed by Congress, 41 complaints have been issued. Where the Commission has jurisdiction, we would hold insurance companies to a high degree of responsibility in their dealings with the public. Consequently, we do not approve of some of the statements made by the hearing examiner in his consideration of the advertising in question.

However, that matter is not now before us. Since the filing of the initial decision, Mississippi has adopted the model code, effective as of February 29, 1956.

The law governing such a situation is clearly expressed in *United Corporation, et al.*, v. *Federal Trade Commission* (1940), 110 F. 2d 473, as follows:

"And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the [fol. 159] filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future."

In *Chamber of Commerce of Minneapolis, et al.* v. *Federal Trade Commission* (1926), 13 F. 2d 673, the Court said:

"As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon."

It thus appears that in every state involved in this case, state regulation now prevents further action by the Commission.

In accordance with the views expressed in this dissent, we would deny the appeal and dismiss the complaint.

April 24, 1956.

[fol. 160] ADDITIONAL VIEWS OF COMMISSIONER MASON—April 24, 1956

The issue here resolves itself basically into that ever fundamental question—states' rights versus centralized government.

Our problem is not the determination of which philosophy is right—that is a legislative function. Our sole duty is to determine which road Congress has directed us to follow in the instant matter.

In my opinion, if the rationale on which the majority bases its decision in this case stands, it must of necessity follow that the Federal Government has almost unlimited control over the management of the insurance business.

This would apply not only to false advertising of health and accident policies, the present center of our attention in 41 cases, but would include all other aspects of the business of insurance, such as the approval of policy forms, the establishment of rates, the maintenance of reserves, the regulation of agency commissions, and the countless other components of the internal management of any single company or companies.

[fol. 161] To transfer in one fell swoop the control of every phase of the business of insurance, whether regulated or not by state law, to the Federal Government when crossing state lines is to flout the expressed intent of Congress.

April 24, 1956.

BEFORE FEDERAL TRADE COMMISSION

MINUTE ENTRIES

Answer of Counsel supporting Complaint to Respondent's Motion to include Mississippi Law in Record and to Dismiss Complaint;

Order of Secretary of Federal Trade Commission on Ruling on Motion of Respondent, issued 5/11/56;

Omitted from the Printed Record, pursuant to Petitioner's Designation as to Printing record, copied at page 1.

* * * * * * *

Before Federal Trade Commission

Secretary's Certificate to Record

I, Robert M. Parrish, Secretary of the Federal Trade Commission and official custodian of its records, do hereby [fol. 162] certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, in four parts, as follows:

Part 1—Pleadings.

Part 2—Testimony.

Argument.

Part 3—Exhibits—Documentary—Commission 1 to 46, incl.

Part 4—Exhibits—Documentary—Commission 47 to 58, incl.

That his transcript is certified to the United States Court of Appeals for the Fifth Circuit, pursuant to the filing in said Court of an Order to Cease and Desist, issued by the Federal Trade Commission April 24, 1956, in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 5th day of July, A. D. 1956.

Robert M. Parrish, Secretary. (Seal.)

Testimony filed in Part 2 Exhibits to testimony filed in Parts 3 and 4.

[fol. 163] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16132

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY,

versus

FEDERAL TRADE COMMISSION

ARGUMENT AND SUBMISSION—Jan. 29, 1957

On this day this cause was called, and after argument by J. D. Wheeler, Esq., for petitioner and Robert B. Dawkins, Esq., Assistant General Counsel, Federal Trade Commission, for respondent, was submitted to the Court.

[fol. 164] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16132

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY—Petitioner,

versus

FEDERAL TRADE COMMISSION, Respondent

Petition for Review of an Order of the Federal Trade Commission, sitting at Washington, D. C.

OPINION—April 9, 1957

Before Hutcheson, Chief Judge, and Cameron and Jones, Circuit Judges.

JONES, Circuit Judge: The petitioner, the American Hospital and Life Insurance Company, is a corporation of Texas. Its principal or home office is in San Antonio, Texas. It is engaged in the business of writing health and accident insurance. It has been licensed to do business and is doing

business in Arizona, Arkansas, Colorado, Illinois, Indiana, [fol. 165] Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma and Tennessee, as well as in the State of Texas. In each of these states the petitioner has agents through whom its business is conducted. Each of the states has statutes forbidding deceptive and misleading advertising. The petitioner employed printed brochures which it sent from its home office to its agents for use in advertising and soliciting business. It did no advertising by newspapers or other periodicals or by radio or television. The Federal Trade Commission issued its complaint against the petitioner charging it with engaging in unfair and deceptive advertising practices in commerce in violation of the Federal Trade Commission Act, 15 U.S.C.A. §41, et seq. The petitioner asserted that its advertising was not false, misleading or deceptive. It also contended that the Commission was without jurisdiction because of the McCarran Act. After hearing the Examiner of the Commission, in an initial decision, held that the charges concerning the petitioner's advertising had not been sustained. The Examiner also held that the Commission was without jurisdiction, except as to petitioner's transactions in Mississippi where, at the time of the hearing, there was no adequate law regulating false and deceptive acts and practices. The Commission, on appeal, set aside the initial decision of the Examiner by a three to two decision. It determined that in passing the McCarran Act the Congress did not, and did not intend to, deprive the Commission of the power to regulate and control the interstate activities of insurance companies. It found the advertising brochures which had been sent from Texas to the other states were false and deceptive. It [fol. 166] entered a Cease and Desist Order which is before us for review. In the opinion of the majority of the Commission, it was said that "there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by state law."

In the South-Eastern Underwriters case,[1] of which more will be hereafter said, Mr. Justice Black, in the majority opinion observed that "Perhaps no modern commercial

[1] United States v. South-Eastern Underwriters Association, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440.

enterprise directly affects so many people as does the insurance business". Although it has not been classed as a public utility charged with the duty of serving all who may apply,[2] the business of insurance has been more generally regulated than any other sphere of business activities not a public utility.[3] It was determined in 1868 that the insurance business did not constitute transactions in commerce,[4] and this doctrine was adhered to in many subsequent decisons.[5] In 1944 came the South-Eastern case, *supra*, where, in a four to three decision, with two justices of the court not participating, it was held generally that insurance businesses are engaged in "commerce among the several states", and specifically that the Sherman Anti-Trust Act[6] applied to insurance activities. Mr. [fol. 167]. Chief Justice Stone, in his dissenting opinion, said that the action of the majority in overturning the precedents of the seventy-five years "cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power raising questions which cannot be answ-ed for years to come * * * ".[7] The litigation has not yet reached the flood stage and the McCarran-Ferguson Act,[8] sometimes referred to as Public Law 15, and more often merely as the McCarran Act, has been the only national legislation of consequence resulting from

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[2] National Union Fire Insurance Co. v. Dickinson, 128 Ark. 367, 194 S. W. 254.

[3] For a statement of the reasons for and history of the regulation of insurance see 1 Richards on Insurance, 5th Ed. 136, et seq.

[4] Paul v. Virginia, 8 Wall. (U.S. 168, 19 L.Ed. 357.

[5] These were reviewed by the Supreme Court in 1913, where it was said of the prior decisions "they constitute a formidable body of authority and strongly invoke the sanction of the rule of stare decisis." New York Life Insurance Co. v. Deer Lodge County, 231 U.S. 495, 34 S. Ct. 167, 58 L. Ed. 332.

[6] 15 U.S.C.A. § 1 et seq.

[7] 322 U. S. 583.

[8] 59 Stat. 33, 15 U.S.C.A. §§ 1011-1015.

tne decision. This act was proposed by Senators McCarran and Ferguson and on March 9, 1945, it was signed by the President and became a law. The enactment is brief and many of its provisions are here pertinent.[9]

[fol. 168] The purpose and effect of the McCarran Act has been stated by the Supreme Court, it saying:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that

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[9] An act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That: The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1941, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the

the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.

"Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that [fol. 169] they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these varia-

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business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

tions." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342. See *North Little Rock Transp. Co.* v. *Casualty Reciprocal Exchange*, 8th Cir. 1950, 181 F. 2d 174; *American Universal Ins. Co.* v. *Sterling*, 3rd Cir. 1952, 203 F. 2d 159.

By the Act it was provided not only that the business of insurance should be subjected to regulation by the States, but that until June 30, 1948,[10] the Sherman Act, the Clayton Act and the Robinson-Patman Act should not apply to the business of insurance, and after that date the Sherman and Clayton Acts and the Federal Trade Commission Act should apply to such business to the the extent it is not regulated by State law. It is also provided that nothing contained in the Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation. Then too it was provided that the Act should not affect the application of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act to the business of insurance. These provisions evidence a design on the part of Congress to yield to the States which had undertaken, or which would [fol. 170] undertake, to regulate the insurance business in those fields in which the Sherman Act might otherwise have been applicable, with the exception of boycotts, coercion and intimidation. Such was the intent of the Congress. Senator McCarran, in response to the query of a colleague, said:

> "The Senator will recall the Southeastern Underwriters case. The decision was startling. It created consternation in the insurance business because by previous decisions rendered during the past 50 years or more we were entitled to believe that the business of insurance was not to be classified as interstate commerce. The Supreme Court of the United States specifically, directly, and emphatically put it into the category of interstate commerce. It put it squarely

[10] The moratorium, intended to permit the States to enact regulatory measures if the laws were inadequate for the purpose, was extended from January 1, 1948, to June 30, 1948, by Act July 25, 1947, c. 326, 61 Stat. 448.

> under the Sherman Act, the Clayton Act, and other Acts. The pending bill is for the purpose of creating a moratorium for 3 years in order that the business of insurance shall not be interfered with by any Federal power under either the Clayton Act or the Sherman Act. So during the period of moratorium the various states themselves may take steps to regulate the business of insurance."

Senator McCarran again said: "The moratorium would not be continued; but if in the meantime the states themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other Acts would not be effective."

The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing [fol. 171] business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. The Supreme Court, we think, has expressed the same view in holding, with respect to another phase of state insurance regulation.

> "These regulations can not be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business." *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777.

If there is an "irreducible area" of Commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it.

The Commission relied heavily upon *United States* v. *Sultanus*[11] in support of its jurisdiction. An indictment

[11] 7th Cir. 1951, 192 F. 2d 96.

was returned, in the Sylvanus case, for use of the mails to defraud in the sale of insurance by mail. The McCarran Act was held to be no bar to prosecution. A fraudulent scheme carried on by use of the mails would violate the mail fraud acts even though the mails never crossed a state [fol. 172] boundary.[12] The doctrine of the case, with the decision of which we have no disagreement, is of no bearing on the problem before us here. A violation of the postal laws does not of itself confer jurisdiction on the Federal Trade Commission.

The Commission's Examiner found that each of the States in which the petitioner did business, except Mississippi, had enacted laws for the regulation of false and deceptive advertising. Mississippi enacted such a law while the matter was pending before the Commission. This is not controverted. The Examiner found that the petitioner's advertising matter was not false, misleading or deceptive. Holding, as we do, that the Commission was without jurisdiction, we do not reach the merits.

The order of the Commission is set aside and

Reversed.

[fol. 173] In United States Court of Appeals

No. 16132

The American Hospital and Life Insurance Company

versus

Federal Trade Commission

Judgment—April 9, 1957

This cause came on to be heard on the petition of The American Hospital and Life Insurance Company for review of an Order of the Federal Trade Commission issued on April 24, 1956, in Docket No. 6237, and was argued by counsel:

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[12] See New York Life Insurance Co. v. Deer Lodge County, supra.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, set aside and reversed.

[fol. 174] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 175] Supreme Court of the United States, October Term, 1956

No. 436

Federal Trade Commission, Petitioner,

vs.

The American Hospital and Life Insurance Company

Order Extending Time to File Petition for Writ of Certiorari—June 27, 1957

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1957.

(S.) Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 27th day of June 1957.

[fol. 176] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—November 12, 1957

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 435 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U.S.
FILED
SEP 6 1957
JOHN T. FEY, Clerk

No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above cause on June 6, 1957.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 25–36) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1957 (Appendix B, *infra,* p. 37). The time for filing a petition for writ of certiorari was extended by Mr. Justice Brennan on August 23, 1957, to September 6, 1957 (Appendix C, *infra,* p. 38). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) authorizes the Federal Trade Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. The question presented is whether the McCarran-Ferguson Act (15 U. S. C. 1011–1015) is to be construed as divesting the Commission of jurisdiction over false and misleading advertising in connection with the interstate sale of insurance because of the mere enactment of state laws prohibiting such practices within the boundaries of the states involved.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45, provides in part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 15 U. S. C. 1011–1015 (herein referred to as the McCarran-Ferguson Act), provides:

> *Be it enacted by the Senate and House of Representatives of the United States of*

America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not

apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

STATEMENT

On March 11, 1955, the Federal Trade Commission issued a complaint against the respondent, the National Casualty Company, charging that the company had in the course of its interstate business of selling accident and health insurance falsely advertised its insurance policies and thereby violated the Federal Trade Commission Act (R. 2–11, 19).[1] In its answer, National admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading and denied that it had violated the Federal Trade Commission Act. The answer affirmatively alleged that under the McCarran-Ferguson Act the Commission was without jurisdiction over the company's interstate insurance business because

[1] We use the designation "R." to refer to the printed appendix of the National Casualty Company in the court below.

of the enactment of state statutes regulating unfair or deceptive acts or practices within the states involved (R. 15a–18a).

The facts. Hearings were held before an examiner, who made detailed findings of fact (R. 269a–283a). The basic facts relating to the conduct of National's business, as found by the examiner, adopted by the Commission, and accepted by the court below, are as follows:

National is a Michigan corporation with its principal place of business in that state (R. 269a). It is engaged in selling health, accident, and all types of casualty insurance and is licensed to sell such insurance in all states, the District of Columbia, and Hawaii. The challenged representations relate only to its accident and health insurance business, from which it received premiums of more than $15,000,000 in 1953 and more than $16,000,000 in 1954 (R. 269a).

National sells its insurance policies through the solicitation of from 350 to 400 direct but independent insurance agents throughout the nation (R. 269a). National prepares and sends interstate to these agents direct mailing cards, stuffers, one-page lead sheets, form letters, applications with tear sheets, and throwaways (R. 269a–270a). Most of the material containing the challenged representations is shipped by mail to the agents in bulk. The agents disseminate the material locally either by mail or personal distribution. Something less than 5% of National's advertising material, however, is also disseminated

by National directly from its offices in Detroit to the public on behalf of its agents (R. 270a).[2]

The examiner's decision. The examiner grouped the challenged representations into five categories: (1) misrepresentations as to the continuation of the policies after purchase;[3] (2) misrepresentations as to the required physical condition of the insured;[4] (3) misrep-

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[2] 80% or more of National's accident and health policies are issued by it from its home office after receipt, checking, and consideration by it of the prospect's signed application previously secured by the agent. Policies issued are forwarded to the agent for delivery to the insured. A limited number of agents may issue policies directly, but National has the right to reject such policies after consideration of the application and policy which have been forwarded to it by the issuing agent.

[3] Under this category, the examiner found that National represented the following (R. 272a): "No increase in premium because of age. * * * No decrease in benefits because of age. * * * Lifetime accident benefits. * * * For employed men and women ages 16 to 69 years inclusive. * * * Life indemnity accident coverage. * * * For individuals or family groups—ages 1 day to 69 years. Security plan with lifetime benefits. * * * I understand this peace of mind and security will be mine from the first day—even for life. * * * We have removed all age termination limits from the policy."

The examiner found that National's policies "all provide that they may be terminated" by National at its option at the end of any premium period, and that two of its policies provide that they "may be cancelled at any time" by National. The examiner held that the representations are deceptive and misleading in that "these statements can reasonably be expected to give a substantial number of readers the definite impression that the policy will continue in effect so long as premiums are paid at least until age 69, or even for life, with full indemnification" (R. 273a).

[4] With respect to this category, National advertised the following: "No medical examination required." The examiner found that National's policies all provide that no benefits will

resentations as to the extent of coverage;[5] (4) misrepresentations as to the dollar amounts payable for opera-

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be paid for loss resulting from sickness, the cause of which is traceable to a condition existing prior to or within a certain number of days (usually 15 or 30) after the effective date of the policy, and that National shall have the right and opportunity "to examine the person of the insured when and as often as it may reasonably require" during the pendency of any claim under the policy. National's accident policies require that "the loss shall result directly and independently of all other causes," to show which the insured may have to submit to medical examination. The examiner held that the representation that no medical examination is required carries the definite impression that National "insures without regard to the prospect's physical condition either before or after issuance of the policy," and that since this is not the fact the representation is misleading and deceptive (R. 273a–274a).

[5] Under this category, National advertised as follows (R. 275a): "The most complete and broadest coverage at the lowest rates. * * * Monthly benefits up to $300 per month paid from first day of sickness or accident plus $300 per month for hospitalization. * * * Hospital room and board for 100 days for each sickness or accident. Your choice of plans paying from $5 to $12.50 per day. Pays full benefit even if your hospital room costs less. * * * Guaranteed monthly income for sickness. * * * Guaranteed monthly income for accidents. * * * When I am sick $600 a month as long as three months. * * * New modern all-inclusive hospital surgical nurse protection. * * * Occupational and non-occupational accidents fully covered. * * * Full coverage on or off the job. * * * Full coverage for female diseases. * * * You should be fully protected against these expenses."

The examiner found that National's policies "contain exclusions and limitations which belie 'most complete' or broadest coverage' 'fully protected', 'first day of sickness', etc." (R. 275a–276a). The examiner held that the discrepancies in this respect between the promises of the advertising and the provisions of the policy "may well be reasonably expected to give a prospect an impression of wider and fuller coverage than he gets," and that the advertising representations are "deceptive and misleading" (R. 276a).

tions;[6] (5) misrepresentations as to the time periods for which monthly benefits would be paid.[7] The examiner found that National's policies were deceptively advertised as charged except for category number four.

With respect to the jurisdictional issue, the examiner held that the Commission had jurisdiction to proscribe

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[6] Under this category, National advertised as follows (R. 277a, 298a): "Surgical Operations, whether performed in or out of the hospital, are paid up to $300 IN ADDITION TO HOSPITAL BENEFITS. FULL benefits are paid to all insured members of the family group. * * * SURGERY BILLS from $5 to $300 for sickness or accident. * * * Pays surgical operation expenses up to $300. * * * Surgical plan—to $300. * * * Three choices of surgical operation benefits $5 to $150, $7.50 to $225, $10 to $300. * * * Your Doctor Bills Paid AT HOME, AT HOSPITAL, AT YOUR DOCTOR'S OFFICE. * * * $10 to $300 Available Surgical Operation Fees. * * * Pays surgical operation fees up to $150. * * * Who Pays These Bills? YOU SHOULD BE FULLY PROTECTED AGAINST ALL THESE EXPENSES. * * * NEVER BEFORE HAS SUCH PROTECTION BEEN OFFERED."

The examiner held (R. 278a) that these representations are not false or misleading. The Commission reversed on this point (R. 298a–300a), stating in part (R. 301a–302a): "Through such statements, respondent has represented, among other things, that the policies to which they refer provide indemnity up to a maximum sum of $300 for any operation serious enough to cost such an amount. Respondent's policies do not so provide."

[7] Under this category, the examiner found (R. 279a) that National's "representations reasonably give the impression of indemnification in a specific amount for a definite period of time. 'From the first day for two years,' 'From the first day as long as totally disabled—even for life,' 'Accident income $— per month,' etc., reasonably convey that impression."

He further found (R. 279a–280a) as follows: "Respondent's policies themselves, however, confer the indemnity promised only if the insured is wholly and continuously disabled by sickness and prevented thereby from performing any and every occupation or employment plus being under the personal at-

deceptive and misleading representations made by National and disseminated directly by mail to prospective purchasers in the several states. He further held that the Commission had jurisdiction to stop National from transmitting such deceptive and misleading representations to its agents for local dissemination in the states of Mississippi, Rhode Island, Missouri, Montana, and the District of Columbia. However, on the basis of the McCarran-Ferguson Act, the examiner concluded that the Commission had no jurisdiction over similar acts and practices of National involving its agents in the other states, each of which had enacted legislation prohibiting the dissemination of false or misleading statements regarding insurance (R. 287a).[8]

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tendance of a doctor. Obviously, there is much illness and disability which does not meet these requirements, especially during convalescence. Some of respondent's policies require continuous confinement to the house, before respondent will pay. Other exclusions are any indemnity for more than one month where loss is due to tuberculosis, hernia, paralysis, or mental derangement; no sickness which began before thirty days after policy issuance; disability arising more than 5, 20, or 30 days after the accident; maternity benefits only after policy has been in effect 10 months—in other words, respondent gets 10 months' premiums before it has to pay for loss of time for maternity."

[8] The examiner found that some 36 states had enacted the so-called "Model Code" or "Unfair Trade Practice Model Bill", which prohibits the dissemination of false or misleading statements regarding insurance. And he found that, in addition to these 36 states, 8 others had statutes which, "while couched in different language or varying somewhat in detail, are essentially the same in effect as the 'Model Bill.' Of the remaining five [jurisdictions], one—Mississippi—has no 'regulation' of the insurance business at all, and remaining four have only statutes which patently refer only to life insurance companies, which this respondent is not." (R. 284a–285a.)

The Commission decision. The Commission held that all the advertising representations set forth in the complaint were unfair and deceptive as charged. It further held that it had jurisdiction over the unfair and deceptive advertising practices of National in interstate commerce and that the mere enactment of state laws relating to such practices did not operate to divest it of jurisdiction (R. 293a–294a). The Commission accordingly entered an order consonant with these views (R. 301a–305a).

On the question of its jurisdiction, the Commission relied upon its opinion in *American Hospital and Life Insurance Company* (Appendix D, *infra,* pp. 39–92). In that case, on similar facts, the Commission recognized that the McCarran-Ferguson Act was enacted for the purpose of allowing the states to continue to regulate the business of insurance in their usual manner, thus dispelling doubts raised by *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533. But the Commission did not read the Act, especially in the light of circumstances that led to its passage, as a complete abdication of all federal regulation of the interstate aspects of the business of insurance (*infra,* pp. 41–55). Such activities, the Commission held (*infra,* pp. 46–47), could not be "regulated by State law" and hence remained subject to its jurisdiction by virtue of the Section 2 (b) proviso "That after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." In the Commission's view (*infra,* p. 53), there is "an irreducible

area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation 'to the extent that such business is not regulated by State law' is inoperative."

Implicit in the view of the hearing examiner, the Commission stated (*infra*, pp. 41–42), "is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. * * * We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation admits of such a construction." The Commission further stated (*infra*, pp. 47–49, 54):

> The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent

> to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.
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> * * * * *
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> * * * Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.
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> * * * * *
>
> By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. * * *

The Commission thus concluded that the mere enactment of a state law relating to advertising practices of insurance companies did not operate to oust it of jurisdiction.

The Court of Appeals decision. On National's petition to review, the court below set aside the Commis

sion's order and remanded the case to the Commission for further proceedings consistent with its opinion. In rejecting the Commission's conclusion on the jurisdictional issue, the court (*infra,* p. 32) recognized "some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation." The court, however, held that the Commission was without jurisdiction in those states which had enacted legislation relating to insurance advertising.

REASONS FOR GRANTING THE WRIT

1. This case presents a substantial question of wide public importance as to the scope of the regulatory authority of the Federal Trade Commission. The question is whether the Commission, as the court below held, has no effective jurisdiction over the advertising practices of the insurance industry—a business viewed by this Court as "one of the largest and most important branches of commerce," one which "touches the home, the family, and the occupation or the business of almost every person in the United States." *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, 540.

More specifically, the case involves advertising practices in connection with sales of accident and health insurance. Such sales quadrupled in the decade following the 1944 *South-Eastern Underwriters* decision and yielded in 1955 a conservatively estimated 2.8 billion dollars in premium volume—a premium vol-

ume second only to life insurance. The number of persons protected today by voluntary health insurance, sold by over 700 companies in the United States, amounts to more than 63% of the entire population of the nation. In addition, approximately 60% of the estimated 60,000,000 working population have some degree of insured protection against loss of income resulting from accident and sickness.[9]

Taking note of widespread evidence that the extraordinary growth of this type of insurance has been accompanied in many instances by false and misleading advertising, the Commission has undertaken an active program under Section 5 of the Federal Trade Commission Act to eliminate such practices from the channels of interstate commerce. In all, the Commission since October 1954 has issued 41 complaints charging insurance companies with engaging in false and misleading advertising practices in connection with the interstate sale of accident and health insurance. The Commission has issued 13 orders to cease and desist under these complaints, and hearing examiners have issued initial decisions containing orders in ten other cases which have not yet been acted upon by the Commission. The cases comprise every possible method of advertising and selling accident and health insurance in interstate commerce, including use of the United States mails (as in the instant case), radio, television, newspapers, and other periodicals.

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[9] These statistics appear in *The Weekly Underwriter*, Vol. 174, No. 1, p. 82 (January 7, 1956), and *id.*, Vol. 176, No. 1, p. 82 (January 5, 1957).

The decision of the court below, however, denies to the Commission any effective jurisdiction in this field. In reaching that decision, the court below followed the decision of the Fifth Circuit in *American Hospital and Life Insurance Company* v. *Federal Trade Commission,* 243 F. 2d 719, in which the Commission is also seeking certiorari in an accompanying petition. Under these two decisions, Commission jurisdiction is automatically extinguished upon the mere enactment of state laws relating to insurance advertising practices—extinguished without regard to the fact that the transactions may, as a practical matter, be beyond the scope of effective state regulation; without regard to the fact that the transactions may have both interstate and intrastate aspects; and without regard to the fact that the federal action would not conflict with state action.

These holdings, we submit, present a question which should properly be resolved by this Court.

2. As this Court noted in *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 552: "The power granted Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." This inherent incapacity of "the individual states, with their limited territorial jurisdictions," was left unchanged by the McCarran-Ferguson Act, which indisputably did not

add to the jurisdiction possessed by the states prior to the *South-Eastern Underwriters* decision. As pointed out in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413: " * * * even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in [*South-Eastern Underwriters*] might be found to have on State regulation of insurance." Thus, the House report accompanying the legislation flatly stated: "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." H. Rep. No. 143, 79th Cong., 1st Sess., p. 3. See also 91 Cong. Rec. 1443. To the extent, therefore, that "the individual states, with their limited territorial jurisdictions [were] not fully capable of governing" insurance "transactions which, reaching across state boundaries, affect the people of more states than one," that condition necessarily continued after enactment of the McCarran-Ferguson Act. The result, in the absence of federal regulation to fill the void, is a legal vacuum—a "no man's land" which is not effectively regulated either by the states or by the federal government.

This was recognized by the court below, which acknowledged that "[t]here is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is

a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation" (*infra,* p. 32). The court, however, denied "that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be" (*ibid.*). Under the court's construction of the proviso to Section 2 (b), the Commission's jurisdiction in the field is limited, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising.

In so holding, the court treated the proviso to Section 2 (b) as "the only express grant of power to the Federal Trade Commission over the business of insurance contained in the Act" (*infra,* p. 32). But the Commission's jurisdiction over interstate commerce (including the interstate sale of insurance) is derived from its organic statute, the Federal Trade Commission Act. The question is, therefore, not whether the McCarran-Ferguson Act confers on the Commission jurisdiction over the business of insurance, but whether the Act divests the Commission of the jurisdiction over the multi-state activities of insurance companies which it would otherwise have by virtue of the Federal Trade Commission Act and the *South-Eastern Underwriters* decision. In the Commission's view, to conclude that Congress intended to effect such a divestiture would require far more explicit language than is contained in the proviso to Section 2 (b). Particularly is this so in view of this Court's admonition that exceptions to the anti-trust laws are to be strictly construed. See, *e. g., United States* v. *McKesson & Robbins Co.,* 351 U. S. 305, 316.

In *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, 429–430, the Court recognized that Congress' purpose in enacting the McCarran-Ferguson Act "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation," and by affirmatively declaring the business of insurance to be subject to state regulation and taxation. This purpose is completely consistent with the Commission's action in undertaking to stop false and misleading advertising in the interstate sale of insurance policies.

The Commission, it should be noted, is not attempting to apply a federal statute which conflicts with state legislation.[10] Nor is the Commission here asserting that a federal statute supersedes or invalidates

[10] As an example of inconsistency between federal and state regulation, it is recognized that application of the Federal Trade Commission Act to proscribe rate-fixing among insurance companies would be in conflict with a state enactment authorizing such rate-fixing agreements, and that in the event of such conflict the state enactment would prevail. See *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange*, 181 F. 2d 174 (C. A. 8), certiorari denied, 340 U. S. 823. Such, however, is not the situation in the instant case; there is no conflict between the Federal Trade Commission Act and the state enactments prohibiting false and misleading advertising. Nor is it probable that a conflict would ever arise in the administration of these laws. Of course, in the unlikely event that such a conflict did develop, the state adjudication would presumably be controlling in accord with the principle of the *North Little Rock Transportation Co.* case, *supra*.

state legislation in any way. Instead, all that the Commission contends is that Congress has not divested it of authority under the Federal Trade Commission Act to join with the states in order to provide full protection to the public. Such federal authority would serve to fill the jurisdictional void which the court below apparently concedes would exist under its decision.

Concurrent and complementary regulation of this nature is in no sense unusual in the area of trade regulation, as the Commission pointed out (*infra*, pp. 54–55). Indeed, in the *Benjamin* case itself, this Court pointed out (p. 439), referring to "the division of legislative power into the respective spheres of federal and state authority", that "They were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion." See also, *e. g.*, *Hoke* v. *United States*, 227 U. S. 308, 322.

This case illustrates the difficulties of enforcement if the mere enactment of state statutes relating to issuance advertising is sufficient to oust the Commission of jurisdiction. National disseminates, by mail and other means, advertising material to prospective customers located in all 48 states (as well as the District of Columbia and Hawaii), either directly or through various agents of the company. The problem presented by the case is thus nation-wide in its impact, but the states, acting individually, can not adequately cope with this problem. State insurance laws generally do not even purport to regulate the business of insurance

beyond the borders of the state (*e. g.*, Insurance Code of Michigan, 1956, c. 20, Sections 24.12001–24.12050). And, even assuming that these laws did purport to do so, it is doubtful that citizens of the other 47 states could thereby receive adequate protection.

As Congress recognized in enacting the McCarran-Ferguson Act (H. Rep. No. 143, 79th Cong., 1st Sess., p. 3; 91 Cong. Rec. 1442), the Fourteenth Amendment imposes substantial limitations on the power of the states to regulate out-of-state transactions. See, *e. g.*, *Allgeyer* v. *Louisiana*, 165 U. S. 578; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357. These limitations have not been eliminated as a result of later decisions of this Court. See, *e. g.*, *Osborn* v. *Ozlin*, 310 U. S. 53, 62; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313; *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643.

In addition, wholly apart from constitutional limitations, the authorities of one state can hardly be expected to devote their necessarily limited financial and manpower resources to the investigation and prosecution of misrepresentations made to the citizens of the other 47 states. "And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Assn.* v. *Virginia*, *supra*, at 649, citing *Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407, 418, 419, and *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 619. On the other hand, any attempt by one of the other 47 states to deal inside its

boundaries with advertising originating elsewhere would fail to get at the source of the evil; it would deal only with a symptom rather than the cause.

The problem is even more acute where an insurance company employs no local agents and has no office or assets within the state. In those circumstances, there would seem to be no way in which a state could protect itself from false advertising disseminated from out-of-state points through the media of the United States mails (as in the instant case), newspapers, magazines, radio, or television.[11] Yet, under the decision below, the Commission is precluded from acting even in that situation, so long as the states involved have enacted legislation relating to insurance advertising.

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[11] Compare *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643. There this Court, in connection with an insurer located in Nebraska and engaged in the mail-order health insurance business, held that Virginia "has power to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants on the Secretary of the Commonwealth." *Id.* at 647. In so holding, the Court placed emphasis on "the unpaid activities of those already members, who are encouraged to recommend the Association to friends and submit their names to the home office." *Id.* at 646, 648. See also the concurring opinion of Mr. Justice Douglas, *id.* at 653–654: "A state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesmen, or solicitors to obtain business for it within the state. Then it is beyond the reach of process. In the present case, however, that is only the formal arrangement. The actual arrangement shows a method of soliciting business within Virginia as active, continuous, and methodical as it would be if regular agents or solicitors were employed."

3. The legislative history of the McCarran-Ferguson Act affords no basis, we believe, for any assumption that Congress intended to establish this legal vacuum—this "no man's land"—between federal and state authority. On the contrary, both the House and Senate reports on the bill emphasize that the purpose of the legislation was "to secure adequate regulation and control of the insurance business". S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2. As already shown, that purpose cannot be accomplished under the construction adopted by the court below, which leaves the advertising practices of insurance companies beyond the scope of effective regulation where such companies operate on a nationwide or multi-state scale.

Apart from this statement of purpose, the reports contain nothing dealing directly with the question presented here. The court below, however, relied upon certain general remarks made by Senator McCarran on the floor of the Senate (*infra*, pp. 34–35). But these remarks must be read in conjunction with the statements of the other draftsmen of the proviso to Section 2 (b). Senator O'Mahoney, one of the Senate managers, gave specific assurances that the Federal Trade Commission Act and the other Acts included in the moratory provision would become fully applicable upon the expiration of the moratorium, and that the bill would not delegate to any state the power to legislate in the field of interstate or foreign commerce. 91 Cong. Rec. 1483. Senator Ferguson, cosponsor of the bill and also one of the Senate managers, stated: "If the Senator's statement was that

the proposed act would permit a State to regulate interstate commerce—insurance is interstate commerce—in the various States, the State could not do it." 91 Cong. Rec. 1484. And, on the House side, there is no legislative history whatever supporting the decision below.

Moreover, even the remarks of Senator McCarran are not unambiguous. During the Senate debates, no reference was made to the regulation of false and misleading advertising. Rather, the problem to which attention was directed was the impact on the Sherman Act of state laws authorizing conduct (*e. g.*, rate-fixing) which, apart from the McCarran-Ferguson Act, would be in violation of the Sherman Act. 91 Cong. Rec. 1442–1444, 1477–1488. As already pointed out, we are concerned here with the quite different matter of a federal statute which is wholly consistent with the state legislation. In the absence of a conflict, the legislative history when considered as a whole cannot be read as expressing a Congressional consensus that the Commission should be effectively barred from policing the channels of interstate commerce to protect the public against deception in this important area.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
EARL E. POLLOCK,
Assistant to the Solicitor General.
EARL W. KINTNER,
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SEPTEMBER 1957.

APPENDIX A

No. 12944

In the United States Court of Appeals for the Sixth Circuit

NATIONAL CASUALTY COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Decided June 6, 1957

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Before SIMONS, *Chief Judge,* ALLEN and MILLER, *Circuit Judges.*

MILLER, *Circuit Judge:* The petitioner seeks a review of an order of the Federal Trade Commission requiring the petitioner to cease and desist from engaging in acts and practices in the conduct of its insurance business found by the Commission to be unfair and deceptive, in violation of the Federal Trade Commission Act, as amended. Sec. 45 (a) (1) (6) and (c), Title 15, U. S. Code.

The complaint filed by the Commission alleged that the petitioner in the course of its interstate business of selling accident and health insurance and for the purpose of inducing purchases of such insurance policies, was making statements and representations concerning the benefits of said policies of insurance which were false and deceptive, were to the

prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act. Petitioner by its answer admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading, or was to the prejudice and injury of the public, or that it had violated the Federal Trade Commission Act. The petitioner affirmatively alleged that the Commission was without jurisdiction over its interstate insurance business because of state statutes regulating unfair and deceptive acts or practices within the respective boundaries of the states, within the scope and meaning of the McCarran Act, Sections 1011–1015, Title 15, U. S. Code.

At the hearings which followed, the facts were shown to be as follows. Petitioner is a stock company incorporated under the laws of Michigan for the purpose of selling accident, health and all types of casualty insurance, with its principal office in Detroit, Michigan. It is licensed to sell such policies in all states of the United States, the District of Columbia and Hawaii, through resident agents located therein. It sells its insurance policies by solicitation from 350 to 400 direct, but independent, insurance agents throughout the nation, who operate under contract on commission only. Petitioner prepares and sends to these agents direct-mailing cards, advertising material and applications. The agents mail locally or distribute personally this material to likely prospects, secure leads thereby and then call and personally solicit the prospect. A small percent of direct mail advertising is sent by peti-

tioner from its offices in Detroit to the public. 80% or more of petitioners' accident and health policies are issued by it from its home office after receipt, checking and consideration by it of the prospect's signed application which has been secured by the agent. Any policy issued by petitioner is forwarded to the agent for delivery to the insured. Premium notice forms are printed by the petitioner and furnished to the agents who mail them out locally. Premium collection is the agent's responsibility, only 5% or less being remitted directly to the petitioner in cases of unusual or temporary situations.

The Hearing Examiner held that four of the five categories of advertising set forth in the complaint were unfair and deceptive as alleged. He held that the Commission's overall interstate jurisdiction was limited to the four states and the District of Columbia which had no statute regulating unfair or deceptive acts or practices in the business of insurance within their respective boundaries. He also held that the Commission had jurisdiction in all states over the advertising practices of petitioner to the extent that its deceptive advertising material was disseminated by the petitioner by the use of the United States mails. He issued a Cease and Desist order to that effect.

Upon appeal, the Commission reversed the Examiner in part, holding by a three-to-two decision that it had full jurisdiction over the interstate sale of insurance by means of unfair and deceptive advertising practices, irrespective of whether the state had adopted a local law regulating such practices within its boundaries. Since, in our opinion, this case will be disposed of on the jurisdictional issue, it is unnec-

essary to discuss petitioner's contentions that its advertising was not false or misleading and that the proceeding and the issuance of a Cease and Desist order did not serve any public interest. The jurisdictional question involves the construction and application of the McCarran Act referred to above.

The background giving rise to the McCarran Act is important.

In 1869, the Supreme Court upheld the validity of a Virginia statute which regulated foreign insurance companies, on the ground that the statute did not offend the Commerce Clause of the U. S. Constitution because "issuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia,* 8 Wall. 168, 183. Thereafter, in similar cases, the Supreme Court consistently ruled that the business of insurance was not commerce. In *New York Life Insurance Company* v. *Deer Lodge County,* 231 U. S. 495, 503-504, 510, the Supreme Court, as late as 1913, held to this view, stating in its opinion in that case that "contracts of insurance are not commerce at all, neither state nor interstate." However, in 1944, the Supreme Court in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, a case involving alleged violations of the Sherman Anti-Trust Act, again considered the question and in a four-to-three decision, held that the business of insurance conducted across state lines was interstate commerce subject to regulation by Congress under the Commerce Clause.

The Supreme Court's decision was vigorously protested in the insurance field. The insurance companies, relying upon the court's previous rulings, had engaged in practices which were prohibited under the federal anti-trust laws but which were permitted

under the laws and regulations of the various states. The states feared the loss of large revenues under their laws taxing insurance sold within the states, which, under the new ruling, might be held discriminatory of interstate commerce and, therefore, unconstitutional. As a result of this vigorous reaction to the decision, Congress passed the so-called McCarran Act of 1945. This Act provides in part as follows:

> SEC. 1. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of taxation of such business by the several States.
>
> SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> SEC. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the

Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

The petitioner contends that the purpose of the Act was generally to restore the insurance business to the situation existing prior to the decision in the *South-Eastern Underwriters* case, and that in states in which the insurance business was regulated by state law, such business was not subject to regulation by the Federal Trade Commission.

The Commission does not challenge the validity of any state statute regulating the business of insurance, nor the validity of the McCarran Act. It points out that state laws have no extra-territorial effect and cannot regulate the business of insurance beyond the borders of the particular state; that prior to the *South-Eastern Underwriters Association* case, the states were authorized to regulate the intrastate aspects of the insurance business, even though state regulation might affect interstate commerce in insurance; that following the decision in the *South-Eastern*

Underwriters Association case there was a field of interstate business of insurance which the states could not regulate and which Congress did not intend to leave unregulated; that in enacting the McCarran Act, Congress intended only to authorize the states to exercise their police power in the same manner they had exercised it when the business of insurance was not considered to be commerce, and gave the states until January 1, 1948, later extended by statute to June 30, 1948, in which to define a reasonable area of state police power, beyond which they could not go; that after that date the Commission was authorized to regulate insurance on different grounds, namely, regulating the use of the interstate channels of commerce; and that the Federal and state laws in the field of insurance supplement and reinforce one another in order to provide full protection to the public.

The wording of the Act clearly indicates that, regardless of the ruling in the *South-Eastern Underwriters Association* case, Congress did not intend to take from the states the regulation of insurance within the state. Section 1 declares that "the *continued* regulation * * * by the several states of the business of insurance is in the public interest, * * *." [Emphasis added.] Section 2 states, "The business of insurance * * * shall be subject to the laws of the several states which relate to the regulation or taxation of such business." The real question is, to what extent, if any, did Congress provide for federal regulation in addition to state regulation.

The Act is equally clear, by the express wording of Section 3, that until January 1, 1948, subsequently extended by amendment to June 30, 1948, the business of insurance was not subject to the Federal Trade

Commission Act or certain other federal regulatory acts. After January 1, 1948, according to Section 2 of the Act, the Federal Trade Commission Act and the Sherman and Clayton Acts were made "applicable to the business of insurance to the extent that such business is not regulated by state law." That is the only express grant of power to the Federal Trade Commission over the business of insurance contained in the Act. It is a grant expressly limited by its terms to insurance business which "is not regulated by state law." We do not find in those words the "clear and specific grant of jurisdiction" to the Federal Trade Commission which the Commission claims is given to it by the Act. On the contrary, we find the logical and reasonable conclusion from the two sections to be that jurisdiction over the business of insurance was granted to the Federal Trade Commission after January 1, 1948, *only* where the business was not regulated by state law.

There is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation. But it does not follow that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be. Congress realized that by reason of the Supreme Court decision federal jurisdiction existed over the interstate business of insurance. The enactment of the McCarran Act was to correct that situation. It expressly prohibited the exercise of such jurisdiction for a period of approximately three years. After that period it made a restrictive grant of jurisdiction. In order to sustain the contention of

the Commission, we must imply a broader grant of jurisdiction to the Commission after the three-year period than is contained in the express words of the Act. We do not believe that Congress would leave to implication such an important segment of the overall question of jurisdiction which it was dealing with, when it could easily have been provided for by express words. A construction of the Act does not sustain the contention.

Section 4 of the Act provides that nothing contained in the Act shall be construed to affect the application to the business of insurance of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act. If it was intended by the Act to retain in or give to the agencies of the Federal Government jurisdiction over insurance companies engaged in interstate commerce, irrespective of its regulation by state law, this section of the Act was unnecessary and meaningless since the acts referred to would be applicable by reason of the Supreme Court's decision without the provisions of Section 4.

It is probable that in the regulation of the business of insurance by both the federal and state governments there will develop a conflict of policies. The parties agree that in such event the federal regulation would control. If so, "the continued regulation and taxation by the several states," referred to in Section 1 of the Act as being in the public interest, would no longer exist.

The general purpose of restoring to the states the right to regulate the business of insurance as it existed prior to the 1944 decision was carried out by the moratorium provided by the Act until January 1, 1948. During the moratorium there was no jurisdic-

tion over the business of insurance in the Commission. During that period the states which did not have such laws had the necessary time in which to pass regulatory legislation. The tie-in between the moratorium and the obvious invitation to enact regulatory legislation while it existed, both recognized the need of regulating the business of insurance and indicated an intention to permit the states to do it to the exclusion of the federal government if they elected to do so. It seems more logical to conclude that it was the purpose of the moratorium to deprive the federal agencies of their newly acquired jurisdiction over the business of insurance in order to restore such jurisdiction to the states if they elected to assume it, than to conclude that it was the purpose of the moratorium to deprive the agencies of their newly acquired jurisdiction for only a short period of time after which it would be given back to them regardless of what the states did in the meantime.

This construction of the Act is in accord with statements by Senator McCarran on the floor of the Senate on February 26 and 27, 1945, in connection with the Senate's consideration of the Conference Report on S. 340. Senator McCarran stated: "The moratorium would not be continued, but if in the meantime the states themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective." He also said: "During the 3-year moratorium the states may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate, they will have taken the business of insurance out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts.

If during the moratorium the states do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable." 91 Cong. Rec. 1442–1444.

The Supreme Court, since the passage of the Act, has expressed similar views. In *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 429–431, the court said: "obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." It referred to the nation-wide existence of state systems of regulation and taxation and to the great difference in scope and character of the regulations imposed and of the taxes exacted. It then said: "Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." Continuing with the discussion, it later said, "* * * it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." In a later case, *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409–413, the court said: "Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, might be found to have on state regulation of insurance." In *Wilburn Boat Co.* v. *Fireman's Insurance Co.,* 348

U. S. 310, 319, the court in reviewing the enactment of the McCarran Act said: "Passage of the bill followed *United States* v. *South-Eastern Underwriters Assn., supra,* holding that, despite the constitutional doctrine embodied in the *Paul* v. *Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *South-Eastern* case, however, all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue."

In making its ruling the Commission followed its prior ruling in *The American Hospital and Life Insurance Company* case, which at that time had not been reviewed by the Court of Appeals. On April 9, 1957, following the argument on appeal and submission of the present case, the Court of Appeals for the Fifth Circuit handed down its opinion on its review holding that the Commission was without jurisdiction in the matter and setting aside the Cease-and-Desist Order in that case. *The American Hospital and Life Insurance Co.* v. *Federal Trade Commission,* * * * F. (2d) * * *, C. A. 5th. We agree with the ruling of the Court of Appeals in that case.

We are of the opinion that the Federal Trade Commission was without jurisdiction to regulate the insurance business of the petitioner in those states where such business is regulated by state law. The order of the Commission is set aside and the case remanded to the Commission for further proceedings consistent with this opinion.

APPENDIX B

In the United States Court of Appeals for the Sixth Circuit

No. 12944

NATIONAL CASUALTY COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

(Filed June 6, 1957)

ORDER

Before SIMONS, *Chief Judge;* ALLEN and MILLER, *Circuit Judges.*

On petition to review an order of the Federal Trade Commission,

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration Whereof, It is now ordered, adjudged and decreed that the order of the Federal Trade Commission be and it is set aside and the case is remanded to the Federal Trade Commission for further proceedings consistent with the opinion herein.

Approved for entry:

[SEAL] /s/ SHACKELFORD MILLER, Jr.,
United States Circuit Judge.

A true copy.

Attest:

CARL W. REUSS, *Clerk.*
By /s/ GRACE KELLER,
Deputy Clerk.

APPENDIX C

In the Supreme Court of the United States

No. ——, October Term, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1957.

(Sgd) WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of August 1957.

APPENDIX D

United States of America

Before Federal Trade Commission

Commissioners:

John W. Gwynne, Chairman
Lowell B. Mason
Robert T. Secrest
Sigurd Anderson
William C. Kern

Docket No. 6237

In the Matter of

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, A CORPORATION

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

Counsel in support of the complaint issued in this proceeding has appealed from the hearing examiner's initial decision, in which, after holding that Public Law 15 of the 79th Congress (McCarran-Ferguson Insurance Regulation Act) [1] limits the Federal Trade Commission's jurisdiction herein to respondent's activities in the State of Mississippi, he dismissed the complaint for failure of proof.

Respondent, a Texas corporation, is licensed to conduct, and does conduct, a health-and-accident insurance business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi,

[1] 59 Stat. 33 (1945); 15 U. S. C. 1011ff.

Missouri, New Mexico, Oklahoma, Tennessee, and Texas. It sells its health-and-accident insurance policies exclusively through licensed agents in each of those States, and its only advertising consists of printed brochures, which it mails from its home office in San Antonio, Texas, to its agents in other States for display or distribution to prospective policyholders in the course of sales interviews. Applications secured by respondent's agents in States other than Texas are mailed to respondent's home office, where the policies are issued and mailed to the agents for delivery to the new policyholders. The complaint alleged that respondent's advertising contains various false, misleading and deceptive representations in violation of the Federal Trade Commission Act. Respondent maintains that all States in which it carries on its operations have laws that forbid it or its agents to make misrepresentations in the course of selling its insurance and that under the McCarran-Ferguson Act this is sufficient to remove it from the scope of the Federal Trade Commission Act.

Thus at the threshold of our consideration of this appeal we face an important jurisdictional question. The basis of the hearing examiner's holding that the Commission's jurisdiction extends to respondent's transactions in Mississippi alone is that each of the other States where it advertises or sells its insurance policies (saving from consideration respondent's home State of Texas, inasmuch as jurisdiction has not been asserted over respondent's business transacted wholly within that State) fully regulates the business of insurance by legislative enactment and that to the extent such regulation exists our jurisdiction has been withdrawn by the McCarran-Ferguson Act.

That statute[2] directly and expressly provides that after January 1, 1948, the Federal Trade Commission Act shall apply to the business of insurance "to the extent that such business is not regulated by State law." In the judgment of the examiner, the Commission's jurisdiction over the commercial activities of insurance companies is contingent upon an absence of State regulatory legislation. Implicit in that view is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. We need scarcely point out that such a concept not only neglects the exclusive Federal jurisdiction over commerce *among* the States, conferred by Section 3 of Article 1 of the Constitution of the United States, but is incon-

[2] The McCarran-Ferguson Act reads in full text as follows:

"AN ACT To express the intent of the Congress with reference to the regulation of the business of insurance.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914,

sistent with the fundamental constitutional doctrine of the separation of State and Federal powers.

We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation admits of such a construction.

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), the Supreme Court in effect overturned *Paul* v. *Virginia*, 75 U. S. 168 (1868), and the line of related cases, all of which

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known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

"SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

were bottomed on the principle that contracts of insurance are not commerce, either interstate or *intrastate,* and declared that the conduct of fire insurance business across State lines is "Commerce among the several States" and accordingly a conspiracy to monopolize interstate trade and commerce in that business violates the Sherman Antitrust Act. At the same time the Court pointed out that, for constitutional purposes, certain activities of a business may be *intra*state and hence subject to State control, while other activities of the same business may be interstate and subject to Federal regulation. However, the Court did not attempt to decide which State laws were applicable to the business of insurance and to what extent they were not applicable. A local insurance company which sold only within the State was clearly subject to the State laws, but the extent to which a company doing an interstate business was subject to State laws was not made clear.

The McCarran-Ferguson Act was enacted the year following *South-Eastern Underwriters.* Its title states that it is an act to express the intent of Congress with reference to the regulation of the business of insurance. The title does not suggest that Congress was undertaking to give any additional jurisdiction to the States or to take any away; it indicates rather an intent to avoid any ambiguity arising out of the Congressional silence. It appears that the McCarran-Ferguson Act was designed to permit the States to regulate, *in the traditional manner,* the business of insurance. It was not designed to permit insurance companies to secure new business by false or misleading advertising in interstate commerce, nor was it intended as an abdication of Federal jurisdiction under the Sherman, Clayton, and Federal Trade Com-

mission Acts over the business of insurance. Had Congress desired to remove the business of insurance from the scope of these laws, it could have done so by simply providing that for the purpose of those statutes the business of insurance across State lines should not be deemed to be "Commerce among the several States." Quite to the contrary, it expressly applied those laws to the business of insurance within certain limits.[3]

The first section of the Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "Continued regulation" again conveys the idea that Congress did not intend to give anything to the States that they did not already possess. Silence on the part of Congress was not to be construed as imposing any

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[3] The original version of the McCarran-Ferguson Act, as reported by the committees of the respective Houses of Congress, provided flatly that neither the Federal Trade Commission Act nor the Robinson-Patman Act should "apply to the business of insurance or to acts in the conduct of that business." In debate on the floor of the House the wisdom of such an exclusion was questioned (91 Cong. Rec. 1027), and the Chairman of the House Committee on the Judiciary offered to propose to the Joint Committee of Conference the elimination of the exclusionary section and the inclusion of the Federal Trade Commission Act in the moratory section, thus making the Federal Trade Commission Act applicable to the insurance business, along with the Sherman and Clayton Acts, after 1947. No opposition to this proposal was voiced on the floor. The conference committee adopted the suggestion, with the result that the Federal Trade Commission Act was to apply to the business of insurance upon lapse of the moratorium.

barrier to State regulation. That is not to say, however, that there were to be no *other* barriers to or limitatons upon State regulation: areas in which the States could never regulate were not dealt with one way or the other.

In construing the meaning of this section, it is to be borne in mind that under the commerce clause of the Federal Constitution Congress not only has exclusive power to regulate interstate commerce but in exercising that power can even regulate *intra*state activities which affect interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942). When Congress enters this intermediate zone and legislates fully on a given subject, the Federal statute, "*ipso facto*, supersedes existing state legislation on the same subject." *Southern Ry. Co.* v. *R. R. Comm., Indiana*, 236 U. S. 439, 446 (1915).

The first section must therefore mean that the continued regulation and taxation by the States of the business of insurance *to the limits of their constitutional power* is in the public interest. Certainly the States lack the power to tax or regulate purely interstate activities of insurance companies. It can only be that the section provides that State authority over *intra*state insurance business that might affect interstate insurance business could not be disturbed by Federal legislation which did not specifically mention insurance.

We now approach the determination of the proper construction of the crucial second section of the McCarran-Ferguson Act. Subsection (a) thereof makes the business of insurance and everyone engaged therein "subject to State laws relating to the regulation or taxation of such business." This is a clear pronounce-

ment that the *South-Eastern Underwriters* case does not dislodge State regulation of insurance.

The second section goes on to provide in subsection (b):

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance: * * *.

Obviously, this does not purport to give the States the power to legislate outside their jurisdiction. Nor does it interfere in any way with Federal laws covering interstate commerce over which the States could not ever claim jurisdiction, e. g., the postal statutes. See *United States* v. *Sylvanus*, 192 F. 2d 96, 100 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952). Such laws cannot impair or supersede State laws, for they do not relate to the same channels of commerce. And, under the terms of the Act, they become inoperative only if and to the extent that they impair, invalidate, or supersede State laws. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413 (1954).

Section 2 (b) continues:

> *Provided*, That after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Even without such a proviso the Federal Trade Commission Act would have been applicable to those aspects of the business of insurance which are exclusively in interstate commerce, for that area was never reached by State law. They could not, there-

fore, be "regulated by State law." Moreover, if this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance. It is the office of a proviso "to except something from the operative effect or to qualify or restrain the generality of the substantive enactment to which it is attached." *Cox* v. *Hart,* 260 U. S. 427, 435 (1922). The proviso in the McCarran-Ferguson Act must therefore make the Federal Trade Commission Act an exception to the rule that no Federal law not relating specifically to insurance may supersede a State law enacted for the purpose of regulating the business of insurance. It must have been contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof. In its application to the interstate phase of a transaction which cannot be regulated by State law, for example, the Federal law in one sense would supersede a State law covering the same subject matter in a different and local phase of the transaction.

The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign

powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

We observe that Section 3 (a) of the McCarran-Ferguson Act is a moratory clause suspending the application of the Federal Trade Commission, Sherman, Clayton, and Robinson-Patman Acts to the business of insurance for nearly three years. If those statutes were not to "apply *to the business of insurance* or *to acts in the conduct thereof*" until January 1, 1948, we think it logically follows that they were to apply to that business and to those acts after the prescribed date. Thus this subsection, as well as Section 2 (b), is inconsistent with any notion that the Commission's jurisdiction over the interstate aspects of the insurance business was repealed.

In withdrawing Federal jurisdiction under the Federal Trade Commission, Sherman, Clayton and Robinson-Patman Acts over the business of insurance for nearly three years, Congress apparently was attempting to eliminate arguments by insurance companies that Federal regulation alone was adequate and that State regulations were burdening interstate commerce. Congress gave the States about three years in which to define a reasonable area of State

police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

Since the Court in the *South-Eastern Underwriters* case had said that insurance sold by a company in one State to a customer in another State was in interstate commerce, this type of transaction was subject to the jurisdiction of the Commission. During the moratorium, Congress intended that the Commission not exercise its jurisdiction. After that period the Federal Trade Commission Act was again to apply, to the extent that the business of insurance was not regulated by State law. Since the States were given no new jurisdiction, State law could regulate the business of insurance only to the extent possible before the *South-Eastern Underwriters* decision. And, as the Court recognized in that case, there were elements of interstate transactions which the States could not regulate.[4]

The legislative history of the McCarran-Ferguson Act supports the foregoing conclusion. We believe this legislative history shows plainly that in enacting that measure Congress was concerned only with ensuring that State laws regulating the business of insurance should not be superseded in the zone of

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[4] "The power granted to Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states that one—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." 322 U. S. at 552.

"affecting interstate commerce" by Federal legislation not expressly relating to insurance. Thus we find in the reports of the committees of both Houses of Congress this statement:

> Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.
>
> Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds. [Sen. Rep. No. 20, 79th Cong., 1st Sess., 1–2; H. R. Rep. No. 143, 79th Cong., 1st Sess., 2.]

But authority to regulate the interstate aspects of the business of insurance was to remain with the Federal Government, as can be seen from the following

statement in the House Committee report, which was quoted with approval by Senator McCarran in floor debate on the bill (91 Cong. Rec. 1443):

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 277) * * *. [H. R. Rep. 143, 79th Cong., 1st Sess., 3.]

The three cases last cited in the foregoing excerpt all hold that a State's power to tax insurance activities is limited to transactions occurring within its boundaries. We would be hard put to account for the reference to these decisions if the purpose of the McCarran-Ferguson Act were to substitute and exclusive State power for the Federal Trade Commission's jurisdiction over the interstate aspects of the insurance business.

We are confirmed in our belief to the contrary by the decision of *United States* v. *Sylvanus*, 192 F. 2d 96 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952), wherein the Court held that the McCarran-Ferguson Act did not abolish Federal jurisdiction under the postal laws to prosecute for mail fraud

committed in the sale of insurance in a State having its own statutes regulating that business. The Court carefully distinguished the interstate and *intra*state aspects of the defendant's deceptive practices:

> [I]t can not properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails, over which the Congress has, by the Constitution, paramount power and authority. It matters not that the alleged fraudulent actors might be prosecuted under the law of Illinois. The indictment charges simply that acts of deception amounting to a scheme to defraud have been committed by defendants, in conducting their authorized business, and that defendants have availed themselves of the mails in execution or attempted execution of the scheme. It is immaterial that the fraudulent plan itself is outside the jurisdiction of Congress, *Badders* v. *U. S.*, 240 U. S. 391 * * *, or that the scheme charged involved a transaction forbidden by the laws of the state. *O'Hara* v. *U. S.*, 6 Cir., 129 F. 551.
>
> We conclude, then, that it was not the intent of the Congress, by its passage of the McCarran Act, to surrender control of the use of the mails or to cease to authorize the federal courts to determine whether the mails have been utilized in attempted execution of a scheme to

> defraud and that the district court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment. [192 F. 2d at 100.]

Unlike the Federal Trade Commission Act, the postal laws were not expressly brought by the McCarran-Ferguson Act to bear on the business of insurance. Indeed, that statute declares that *no* Act of Congress not specifically relating to the business of insurance shall be construed to invalidate, impair, or supersede any State law regulating that business. Yet in the *Sylvanus* decision, *supra,* the Court held that a postal statute banning a course of conduct which in its *intra*state aspects constituted a State offense was unaffected by the McCarran-Ferguson Act.

All the more, then, under the Federal Trade Commission Act, which the McCarran-Ferguson Act made applicable to the business of insurance, there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation "to the extent that such business is not regulated by State law" is inoperative.

A State can revoke an insurance corporation's charter or license, thus affecting interstate commerce to some degree. To the extent necessary to enable it effectively to exercise its police power the State can take action having consequences in other jurisdictions, and the Federal Trade Commission could not prohibit such regulation. And the text and history of the McCarran-Ferguson Act leave no doubt that the power of the States to tax, or to fix rates for, insurance companies doing business within their territories was

in no way to be invalidated, impaired, or superseded by Federal law. However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those State functions, and we do not believe that the Federal Trade Commission Act, when read in conjunction with the McCarran-Ferguson Act, can be properly interpreted to interfere with the taxing or rate-fixing powers.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413 (1954).

The principle that the Commission may proceed against a practice that may simultaneously be the object of State regulation is one of long standing.[5] Thus the Commission's orders prohibiting the interstate shipment of lottery devices to be used in selling merchandise have been universally upheld on judicial review despite the fact that such devices are not put to their intended use until they have left the channels

[5] As recently as April 2, 1955, the Supreme Court of the United States reaffirmed this principle in *Pennsylvania* v. *Nelson,* 350 U. S. 497, declaring that where the Federal Government had occupied the field of protecting against sedition, States were not thereby prevented "from prosecuting where the same act constitutes both a Federal and a State offense under the police power * * *."

of interstate commerce (just as the respondent's brochures are not displayed for sales purposes until they have come to rest in the hands of respondent's agent within a State). See *Seymour Sales Co.* v. *FTC*, 216 F. 2d 633, 635–6 (D. C. Cir. 1954), *cert. denied* 348 U. S. 928 (1955), and cases therein cited. The idea of a field of enforcement divided between Federal and State Governments is embedded in a number of statutes, in addition to the McCarran-Ferguson Act. Examples of these are Acts dealing with the sale of liquor (the Wilson Act, 26 Stat. 313, and the Webb-Kenyon Act, 33 Stat. 699), convict-made goods (the Hawes-Cooper Act, 45 Stat. 1084, and the Ashurst-Sommers Act, 49 Stat. 494), oleomargarine (32 Stat. 193), diseased plants (44 Stat. 98), black bass (64 Stat. 845), whaling (49 Stat. 1246), prizefight films (54 Stat. 686), and the Federal Power Act (49 Stat. 838).

In view of our foregoing consideration of the terms, legislative history, and judicial interpretation of the McCarran-Ferguson Act, we do not think the statute admits of the construction placed on it by the hearing examiner.

Respondent points out that it did not send its advertising materials to sales prospects but mailed them to its own agents in various States for local use, and that hence its advertising occurred only in *intra*state commerce. We consider such an analysis factitious and unrealistic. Respondent's annual premium collections on health-and-accident insurance sold by its agents throughout fourteen States amount to about $2,750,000. It employs an indisputable channel of interstate commerce, the mails, for sending advertising materials to its agents, receiving applications for insurance from them, and forwarding the issued policies

to them for delivery to policyholders. The actual interview of a prospect, though it necessarily happens at a fixed geographical point within some State, cannot be isolated from the remainder of respondent's established course of dealing. By preparing its brochures and furnishing them, by mail, to its agents in various States for their use in sales presentations, respondent engages in an interstate commercial practice that must be viewed as a whole and not compartmentalized. *Consolidated Manufacturing Co.* v. *FTC*, 199 F. 2d 417, 418 (4th Cir. 1952).

Under the Federal Trade Commission Act, one who sells through agents in other than his home State must answer for deceptive advertising which he supplies to his agents, even though such representations are by necessity conveyed to the public within a particular State. *General Motors Co.* v. *FTC*. 114 F. 2d 33, 36 (2d Cir. 1940); *Ford Motor Co.* v. *FTC*, 120 F. 2d 175, 183 (6th Cir. 1941).

The Commission is accordingly of the opinion that the hearing examiner erred in not holding that the Commission had jurisdiction over such of respondent's practices in interstate commerce as might be found to be unfair or deceptive, irrespective of the existence of State statutes applicable to the *intra*state elements of such practices.

We turn now to the appeal from the hearing examiner's dismissal of the complaint for lack of substantial evidence.

Respondent was charged with falsely representing, among other things, the indemnification provided by its policies might continue to the age of sixty, or for an indefinite period, at the option of the insured. The sole evidence adduced on this allegation consists of brochures which state as follows, or similarly:

NO AGE PROVISION terminating or reducing benefits because of increasing age,

and—

POLICY FORM ASA Issued to Men and Women, ages 18 to 60.

Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

We do not believe that these two statements, separately or together, particularly in the absence of assertions of lifetime duration or any other definite period of coverage, can be reasonably read as meaning more than that respondent's policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified. It is true that respondent's accident-and-health policies are *term* contracts renewable at the option of the company on the premium data. However, nothing to the contrary is expressed or reasonably implied in the aforequoted statements and we therefore discern therein no capacity or tendency to deceive. We uphold the hearing examiner's dismissal of the complaint in this respect.

Respondent was next charged with falsely representing that its policies provide indemnification for all illness or accidents. To prove this charge there were introduced respondent's brochures containing broad, general representations, of which the following are typical:

CONFINING ILLNESS INDEMNITY $_____ PER MONTH

for loss of time from illness, beginning on the fourth day and continuing for one year for

each illness. (Up to two months full benefits for non-confining illness.)

Total
Accident _____per month
Disability

for loss of time from accidental injury beginning with the first day of disability and continuing for life if you are totally disabled.

Partial
Accident _____per month
Disability

for loss of time from accidental injury, beginning with the first day and continuing for period of partial disability (limit 3 months).

In conjunction with the foregoing there were introduced copies of respondent's policies containing conditions substantially limiting the illness and accident benefits advertised. The examiner found that the charges in this regard were not supported by substantial evidence, not for the reason that the representations were not proved nor that the terms of the policies did not materially limit the advertised benefits, but for a number of other reasons which are in our judgment unsound and contrary to controlling precedent.

The examiner attached great weight to the fact that the brochures in question included a statement to the effect that benefits therein described "are subject to the terms of the policy issued." We are not in accord with the examiner's view that such a notice is sufficient to correct erroneous impressions given by the representations "CONFINING ILLNESS INDEMNITY—$____per month for loss of time from illness,

beginning on the fourth day and continuing for one year for each illness," or "TOTAL ACCIDENT DISABILITY—$____ per month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled." Respondent's vice-president, W. C. Murphy, testified that an agent's sales kit consisted of the sales brochures, a rate book, "and, I guess, a fountain pen," and that respondent's agents are not required to carry sample policies with them. These sales brochures consist of an application form and a receipt form for the initial payment. These facts lead us to believe that many applicants do not see sample policies before executing formal applications for respondent's insurance. We consider this circumstance significant. In the context of the sales presentation, in the course of which the prospect has little or no opportunity to inspect a sample policy, the sales brochure, we are convinced, clearly has the tendency and capacity of misleading as to the extent of coverage. We disagree with the examiner's statement that if the prospect would read the entire page he would see that all benefits are subject to the terms of the policy and then if interested he would naturally inquire of the agent as to the terms. Rather it is our view that the brochure functions as a self-contained piece of advertising that of itself is likely to induce a prospect to purchase respondent's insurance.

Furthermore, we do not believe that the prospective purchaser is under any obligation to investigate the extent to which respondent's unrestricted representations of coverage for illness or accidents are untrue. "'Under repeated decisions, the purchaser is entitled to rely upon the representations made.

He need not distrust what is told him. * * * It goes without saying almost that it is extremely difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point." *United States* v. *Sylvanus,* 192 F. 2d 96, 105 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952).

If the busy or careless businessman is entitled to protection from deceptive printed forms, even though an attentive, careful person would not be deceived thereby, *Independent Directory Corp.* v. *FTC,* 188 F. 2d 468, 470, 471 (2d Cir. 1951), it does not devolve upon respondent's prospects to ascertain the extent to which respondent's advertising may or may not exaggerate or falsify. The Federal Trade Commission Act is violated if the first contact or interview is secured by deception even though the true facts are made known to the purchaser before he enters into the contract to purchase. *Carter Products, Inc.* v. *FTC,* 186 F. 2d 821, 824 (7th Cir. 1951).

Another questionable premise in the examiner's reasoning is that "any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence." Apart from the fact that the Federal Trade Commission has the duty to protect not only the "reasonably intelligent" but also the ignorant, the unthinking, the credulous, and the inexperienced, *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F. 2d 676, 679 (2d Cir. 1944), we question whether the fact asserted by the examiner to be common

knowledge—if it be a fact—is generally known even to the "Reasonably intelligent." It is certainly not beyond the realm of actuarial conceivability, not to say possibility, that in these United States in the mid-twentieth century insurance could be written which would afford protection against all illness and all accidents.

The examiner noted that no proof of actual deception was offered and declared, "Absence of such evidence justifies a presumption that none existed." Despite his disclaimer of reliance on such a presumption, it evidently was one of the considerations impelling him to dismiss these charges. This is manifest error. It was firmly established long since that actual deception of the public need not be shown in Federal Trade Commission proceedings and that representations having a capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp.* v. *FTC, supra,* 143 F. 2d at 680.

The initial decision devotes considerable space to three decisions of the Supreme Court of Mississippi, all involving private litigation, in which that Court accorded a more liberal interpretation to the conditions contained in accident and health policies similar to those here than their literal intendment would seem to justify. He concludes from these holdings that the conditions are not so burdensome as to render untrue respondent's broad representations.

The decisional law of a single State is no sure guide to the interpretations that other States may place on respondent's policies. What is more, the fact that a policyholder may eventually prevail over a respondent in an appeal from a jury trial does not rectify the deception inhering in the sales practices whereby

he was induced to purchase the insurance. He may be discouraged by the literal terms of the policy from seeking legal redress. We do not consider that the fact that if he perseveres to his State supreme court he may succeed in winning an interpretation of respondent's policy more favorable to him than the language literally warrants is a substitute for the protection assured him by the Federal Trade Commission Act.

The hearing examiner discusses at some length the reasonableness of the restrictions that respondent attaches to its illness and accident benefits. This is, of course, not germane to the question of whether respondent's representations tend to deceive and mislead.

There remain for discussion two other charges dismissed by the examiner. It was alleged that respondent had represented its hospital-and-surgical-expense policy to provide for the payment of $150 for any operation serious enough to justify such a surgeon's fee. The evidence shows that respondent disseminates a one-page advertisement which, among other things, states that the policy provides for—

SURGERY	
from $3.00 to $150.00 depending on seriousness of operation	$150.00

The policy to which this refers sets out a long schedule of the various amounts payable for specified types of surgical operations. Sixty-seven different benefits are enumerated. A mere six of these amount to $150: operations for removal of a portion of the lung, removal of kidney, removal of a portion of the vertebra, removal of entire prostate or thyroid gland, and cutting into the cranial cavity.

Only $25 is allowed for removal of tonsils and adenoids. Appraising this advertisement as it is likely to be read by unsuspecting, incautious members of the purchasing public, we gain the impression that the policy will indemnify up to a maximum sum of $150 for any surgical operation serious enough to cost such an amount. Thus, if a tonsillectomy cost $50, we would think it reasonable to expect that one insured by the policy would be protected to that extent. The advertisement is therefore deceptive and misleading in that it promises benefits which the policy does not corroborate.

Lastly, it was charged that respondent falsely represented that its hospital-and-surgical-expense policy would pay maternity benefits in addition to room service and hospital expense.

On the advertisements for this type of policy, following a listing of the benefits of room service, hospital expense, and surgery, there is shown as one of the "Additional Benefits:"

> *Maternity:* Up to $_____ after insurance has been in force for 10 months.

We would have difficulty in reading the foregoing as anything less than a representation that the maternity benefit is in *addition* to the other benefits provided by the policy. In actuality, however, the maternity benefit is provided for in a rider wherein it is specified that the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital service." Thus, far from being an *additional* benefit, it is only a *substitute* benefit, and the representation in regard thereto is hence at material variance with the facts. We believe that the type of misconception that such advertising as this can engender in the minds of

couples seeking to provide financially for the birth of children is especially vicious. There can be no question that it is a patent deception to describe as "additional" a benefit which excludes participation in other benefits, directly following a broad representation that hospital and surgical expenses are covered.

In view of the foregoing, the initial decision is vacated and set aside, and our findings as to the facts, made on consideration of the whole record including the initial decision, and conclusions and order to cease and desist will be issued in lieu thereof.

Commissioners GWYNNE and MASON dissent.

APRIL 24, 1956.

United States of America

Before Federal Trade Commission

Docket No. 6237

In the Matter of

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, A CORPORATION

JOINT DISSENTING OPINION OF CHAIRMAN GWYNNE AND COMMISSIONER MASON

We are unable to agree with the views expressed in the majority opinion. The reasons for our dissent are: first, the opinion completely ignores the intent of Congress in adopting Public Law 15 (McCarran Act); second, it would return the insurance business to the uncertainty and confusion which followed the decision in *U. S.* v. *South-Eastern Underwriters Association*

(1944), 322 U. S. 533. It was to remove this uncertainty and confusion that the McCarran Act was adopted.

Prior to the decision in the *South-Eastern Underwriters* case, regulation of insurance was recognized as a problem for the respective states. This was partly because the Supreme Court of the United States in a long line of decisions from *Paul* v. *Virginia*, 8 Wall. 168, *to New York Life Insurance Company* v. *Deerlodge County*, 231 U S. 495, had held that the business of insurance was not commerce.

Although the business of insurance was not subject to regulation under the commerce clause, it was universally recognized as a business affected with a public interest. Consequently, the states found few obstacles to regulating it to the fullest extent and in the manner the respective legislatures thought to be for the public good in their particular states. These laws took the form of determining who should engage in the insurance business within the state boundaries, the terms under which the business might be conducted, regulation as to rates to be charged (even to the extent of fixing them, or permitting representatives of insurance companies to do so under state supervision). The right of the states to levy tax and license fees, even discriminating against foreign insurance corporations, was also recognized. See 44 C. J. S., p. 518; *LaTourette* v. *McMaster, Insurance Commissioner*, 244 U. S. 465.

Had these regulations been directed at the usual industry engaging in interstate commerce, many would have run counter to paramount Federal authority. For example, the many discriminatory taxing programs were not in accord with decisions of the Su-

preme Court relating to interstate commerce generally. Certain state rate regulations were contrary to the philosophy of Federal antitrust laws. No conflict arose, however, because it had been settled that the business of insurance was not interstate commerce.

This does not mean that the insurance business and the states in regulating it were free from all Federal constitutional and statutory provisions. They were, of course, subject to such constitutional restraints as the due process clause, the exclusive right of Congress to establish post offices and post roads [*U. S.* v. *Sylvanus* (1951), 192 F. 2(d) 96] and many others. In fact they were, and still are, subject to all restraints properly imposed by paramount power, except as that power elects to exempt them.

In regulating insurance, states act under that great reservoir of power known as the police power. There are, of course, jurisdictional limitations on the exercise of that power. It may be directed only at activities within the state. It has never been claimed that the states may operate directly in that phase of regulation known as the flow of commerce. Nor by no stretch of the imagination can it be said that the McCarran Act intended to give any such power.

In 1944, in the *South-Eastern Underwriters* case, the court reversed its holdings of 75 years standing and concluded that the business of insurance was interstate commerce. It was also specifically held that it was subject to the Sherman Act.

The immediate effect of this decision was to bring the business of insurance and the laws of the various states regulating it under the paramount power of the Federal antitrust laws. Because of the inconsistency previously referred to, this created considerable un-

certainty and confusion in the insurance field, of which Congress took immediate cognizance.

Confronted with this emergency, Congress had several alternatives:

(1) It might take no action and allow the antitrust statutes to be superimposed on the existing state systems of regulation and taxation. This would create great confusion as to the legal boundaries between Federal and state control, which confusion could only be lessened, bit by bit, as courts made decisions on specific problems.

(2) It might write a comprehensive law for Federal regulation of insurance—a law which would provide new methods for many matters theretofore handled by the states, and which might make such changes in the application of existing antitrust laws to the peculiar business of insurance as experience had indicated might be necessary.

(3) It might recognize and continue existing or future state regulation by removing the obstacles to that regulation which had been called into being by the decision that the business of insurance was interstate commerce.

Congress chose the latter course and expressed its choice by the adoption of the McCarran Act. The general purpose of this legislation was to meet the problems created by the *South-Eastern Underwriters* case. The plan for meeting this problem is clearly expressed in the law. It may be reduced to a simple statement as follows: The Congress declares that the continued regulation and taxation by the states of the business of insurance is in the public interest and shall remain, with two exceptions, namely, (1) this

Act shall not render the Sherman Act inapplicable to agreements to or acts of boycott, coercion or intimidation, and (2) that after June 30, 1948 (but not before), the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance, but only to the extent that such business is not regulated by state law. Thus, in any case, the jurisdictional question may be quickly and certainly resolved by finding the answer to a simple question, namely, is there state regulation to meet the particular problem presented by the facts.

That this is the proper interpretation of the law is indicated by the following: (1) the wording of the statute itself, (2) the legislative history, (3) events which transpired immediately following passage of the law, (4) decisions of the courts interpreting the McCarran Act.

It is, of course, well settled that the power of Congress under the commerce clause is broad and is also paramount. It includes the right to regulate, or even prohibit, the flow of things across state lines, the right to regulate the instrumentalities by which commerce is carried on, and also the right to regulate activities, wholly within the state, which affect interstate commerce. The power to regulate the so-called flow of commerce covers every species of movement of persons and things, whether for profit or not; every species of communication; every species of transmission of intelligence, whether for commercial purposes or otherwise; every species of commercial negotiations, which, as shown by the established course of business, will involve sooner or later an act of transportation of persons or things, or the flow of services or power across state lines. (See the *Analysis of the United*

States Constitution as prepared by the Legislative Reference Service, Library of Congress, and cases cited.)

The great power of Congress to regulate matters wholly within the state but affecting interstate commerce is well settled in *U. S.* v. *Darby* (1944), 312 U. S. 100, in which the court held that the payment of substandard wages wholly within a state affected commerce and could be prohibited.

Going with these great powers, and a necessary corollary to them, is the right of Congress to determine where and when these powers are to be used. Thus, it may decline to exercise certain powers; and it may condition its refusal to exercise them on the fact of regulation by the states.

This is exactly what Congress was seeking to do in the McCarran Act. Much of the fallacy of the reasoning in the majority opinion springs from a refusal to recognize this obvious fact. The majority would decide the issues in this case by applying principles which admittedly were applicable following the decision in the *South-Eastern Underwriters* case. They conveniently ignore the fact that the purpose of the McCarran Act was to prevent the application of these principles.

For convenience, and before discussing the law in detail, the McCarran Act is set out here in full text.

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regula-

tion or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of

June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person, or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected.

While the title to a statute is not, strictly speaking, a part of the law, nevertheless, it is interesting to note that the title is "To express the intent of the Congress with reference to the regulation of the business of insurance."

Immediately after the enacting clause, occurs the following:

> That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, * * *.

This is a clear and positive declaration of Congressional policy, which cannot be read out of the law. It expressly points out the character of state regulation and taxation which is in the public interest. It is the "continued regulation". In the past, the states have done all the regulating so far as the commerce clause was concerned. That was to carry on, with the exceptions expressly provided for, and which will be discussed hereafter. There is nothing in this statement or in the entire Act which justifies the interpretation

that the regulation contemplated was to continue only by the grace of the Federal Trade Commission.

Speaking on this subject in *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, the Supreme Court of the United States had this to say:

> Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several States in these respects.
>
> Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.
>
> * * * * *
>
> * * * it clearly put the full weight of its power behind existing and future State legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, sub-

ject only to the exceptions expressly provided for.

That a declaration of policy by Congress will be given weight by the courts is well settled. See *U. S.* v. *Darby*, 312 U. S. 100.

Continuing, the statute further provides:

> * * * and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Some of the powers granted to Congress by the Constitution are either expressly, or by necessary implication, exclusive and cannot be exercised by the states, even though Congress has taken no action thereon and has remained silent on the subject. The power to declare war is an example. Under the commerce clause, the line between Federal and state authority cannot be so precisely drawn. This is particularly true in the field of state activities which may or may not have a prohibited effect on interstate commerce. The supremacy of the Congress, when properly exercised in this field, is clearly recognized. A difficult problem arises where the powers of Congress are allowed to lie dormant, that is, when Congress is silent on a given subject. Should its silence be construed as a reservation of its power, which will bar any state regulation; or will it be considered as consent to state action until Congress has spoken? This question has arisen many times and has received a variety of answers, depending upon the circumstances of the particular case.

The question of silence of Congress is not involved in this case. The Congress evidently thought it might be raised, and intended to make its position clear. The inclusion of the above quoted clause indicates how

thoroughly Congress has considered this matter and how determined it was to remove all possible barriers to its declared policy of state regulation.

Section 2 (a) provides:

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

When used in this connection, "subject to" means "subordinate to", "obedient to". *Shay* v. *Roth*, Calif. (1923), 221 P. 967; *Davies* v. *City of Los Angeles* (1890), 24 P. 771.

In a long line of cases from *Paul* v. *Virginia* to *New York Life Insurance Co.* v. *Deerlodge County*, insurance companies have challenged their subjection to state regulatory or taxing laws. The Supreme Court, however, consistently rejected this defense on the theory that the business of insurance was not interstate commerce.

When the Supreme Court in *South-Eastern Underwriters* reversed its decision, this defense became good, and the business of insurance was subject to state laws, only to the extent that such laws did not interfere with paramount Federal power under the commerce clause. In Section 2 (a) Congress clearly showed its intention to remove the barrier of its own paramount power and thus make the business of insurance subject to state laws, notwithstanding the decision in *South-Eastern Underwriters*.

Section 2 (b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon insurance: *Provided*, That after

> January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Stronger language to give state laws "top billing" could hardly be imagined. The clause beginning with "unless" is particularly significant. While Congress had not legislated directly concerning the insurance business, it had done so with reference generally to interstate commerce and with reference to persons and corporations engaged therein. The antitrust laws are examples. Congress in Section 2 (b) said none of these laws (except as indicated in the proviso) shall apply to the business of insurance, unless such law specifically relates to insurance. It recognized: first, that insurance has some problems peculiar to that industry; second, that many states had adopted regulatory systems tailored to the insurance business in their boundaries; and, third, that any attempt to superimpose the general laws regulating commerce on these systems would create great confusion.

The proviso applies only to the provision immediately preceding it. *Dahlberg* v. *Young* (1950), Minnesota 42 N. W. 2nd 570. It provides an exception to the general statement preceding it, which exception is that the three Acts named therein shall, after January 1, 1948, apply to the business of insurance—but only to the extent that such business is not regulated by state law. This proviso was adopted to answer criticism of the original House bills, which provided simply that certain laws shall not apply to the

business of insurance or to acts in the conduct of that business. In other words, in the original bills, the House proposed to wash its hands of the whole matter, regardless of whether any particular state had provided regulation. The final version, which was accepted by the House without objection, simply conditioned Federal withdrawal from the field on the fact that the particular state had provided regulatory laws. In view of the strong stand taken by the House in favor of continued state regulation, it does not seem reasonable that it would have accepted, without question, this final version, if (as claimed by the majority) such versions set up concurrent jurisdiction, with the Federal power paramount to the state power.

What Congress had in mind is further illustrated by Section 3 (a) which provides that until January 1, 1948, the antitrust laws should in no event apply to the business of insurance. The majority claim that the purpose of this moratorium was to give the states time "in which to design a reasonable area of state police power. Beyond that reasonable area, states could not go."

That view is based on a misconception of the state police power. That power was reserved to the states by the Constitution. It is not up to the Congress to determine whether it is exercised reasonably. Whether exercised reasonably or not, this power is subject, at all times, to the paramount power of the Federal government under the commerce clause and other constitutional provisions not involved here; and in case of conflict, the question is resolved by the Federal government and not by the states. The whole purpose of the McCarran Act was to express the Congressional intent that the barrier of paramount power

under the commerce clause was to be removed in the event that the states did adopt regulatory laws. The purpose of the moratorium was to give the states time to adopt such laws. Failing to do so in any particular area, the Federal power would still remain.

Section 3 (b) provides:

> Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

The *South-Eastern Underwriters* case involved a boycott by a number of insurance companies operating in several states. The Congress concluded that the paramount power of the Federal government in such cases should remain.

The fact that Section 3 (b) is in the law is a strong argument against the interpretation urged by the majority. If the McCarran Act left the Federal government and the states with concurrent powers (in which the Federal power would necessarily be paramount), why was it necessary to include Section 3 (b)?

The legislative history of the McCarran Act strongly supports our interpretation of the jurisdictional feature.

While the *South-Eastern Underwriters* case was pending in the Supreme Court, bills were introduced in the House, providing for the unqualified exemption of insurance from the Sherman and Clayton Acts. Thereafter, and after considering suggestions by representatives of the National Association of State Insurance Commissioners, and also by representatives of the insurance industry, bills were introduced both in the House and Senate, which bills, with some minor

modification, eventually became the McCarran Act. In some respects, these bills further limited the control of Congress, as, for example, in the inclusion of the Federal Trade Commission Act. In other respects, the Federal authority was broadened to retain control, in all cases where state regulation did not exist. The law, as finally passed, is clear on this point; regulation shall remain in the states with the exception of the boycott situation, and with the exception of those situations where a state either did not or could not adopt the necessary regulations.

There is literally no evidence to the contrary. Note the following excerpts from the Senate debate.

> Senator MURDOCK. And it is intended that on the expiration of the moratorium, the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective, except——.
>
> Senator MCCARRAN. Except as the states themselves have provided regulation.
>
> * * * * *
>
> Senator PEPPER. States may determine whether or not the Sherman and other acts become applicable to the business of insurance?
>
> Senator MCCARRAN. Yes.

What was done after the adoption of the McCarran Act indicates that the persons concerned had no doubt about the meaning of the Act. The National Association of State Insurance Commissioners prepared a model code for the regulation of the insurance business in accordance with the directions of Congress. This code has been adopted by a majority of the state legislatures. Other states have adopted laws which in effect are equivalent

It is difficult to understand why these actions should have been taken if the parties thereto thought that the net result would leave the law as it was just prior to the McCarran Act, which is the contention of the majority in this case.

The McCarran Act has been considered in four Federal court cases. In none of them, did the court experience any difficulty in determining what the McCarran Act meant. In the Sylvanus case, the court said:

> It is clear, we think, that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several States.

In *Maryland Casualty Company* v. *Cushing* (1953), 347 U. S. 409, the Supreme Court said:

> Even the most cursory reading of the legislative history of this enactment (McCarran Act) makes it clear that its exclusive purpose was to counteract any adverse effect that the court decision in the South-Eastern Underwriters case might be found to leave on state regulation of insurance.

The Court then quotes from House Report No. 143, 79th Congress, 1st Session, as follows:

> It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision in the South-Eastern Underwriters case.

A clearer and more concise statement of the extent of the McCarran Act, and also its limitations, could harly be found.

In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange* (1950), 181 F. 2d, 174, the Court said:

> The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by Federal legislation relating to interstate commerce. See *Prudential Insurance Co. v. Benjamin,* supra, p. 429 of 328 U. S.
>
> In view of what was said by the Supreme Court about the effect of the McCarran Act in the *Prudential Insurance Co.* case and the case of *Robertson v. People of State of Calif.*, 328 U. S. 440, 449, 461, there is no need for discussing the validity or effectiveness of the McCarran Act. A ruling that it is invalid or ineffectual, we think, would be absurd.

The *Prudential Insurance Company* case is directly in point. There, the Prudential company challenged a statute of South Carolina which imposed on foreign insurance companies as a condition of doing business within the state, an annual tax of 3% of premiums on business done in the state without reference to transactions, whether interstate or local. It should be noted that the case did not involve purely intrastate matters, which the majority claim is the limit of the McCarran Act's effectiveness. This state tax was clearly discriminatory, affected interstate commerce, and would ordinarily have been stricken down. However, it was not, and the reason given was that a state tax or regulation discriminating against in-

terstate commerce which would be invalid under the commerce clause, in the absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. The only difference between the Prudential case and the one at bar is that the former deals with state taxation and the latter with state regulation. The McCarran Act covers both.

The majority view of jurisdiction under the McCarran Act is entirely different. They say the McCarran Act "was designed to permit the states to regulate, *in the traditional manner,* the business of insurance." They obviously do not mean they are permitted to regulate it as they did prior to the *South-Eastern Underwriters* Case, because their decision in this case asserts the paramount power of Federal laws over those of the states.

Now law of Congress was necessary to give the states a right to carry on activities within their own borders, designed to regulate insurance. That is covered under the police power, guaranteed to the states by the Constitution. Just as Congress with reference to powers under the commerce clause, state legislatures may exercise these powers or not as they choose, subject only to their own and the Federal Constitution. The real problems arise when the exercise of these powers come in conflict with the commerce clause. There, the Federal power is paramount. *Parker* v. *Brown,* 317 U. S. 34. *Southern Railway Company* v. *Railroad Comm. of Indiana,* 236 U. S. 439. But, as was pointed out in the latter case, Congress could have circumscribed its regulation so as to occupy a limited field." This intention to occupy a limited field is the very essence of the McCarran Act.

Just how far the majority would go in disregarding this intention is well illustrated in the case at bar. For example, suppose a state having the model code should decide that certain advertising disseminated therein did not violate the law. Nevertheless, the Federal Trade Commission asserting its paramount power to regulate the flow of commerce into the state comes to an opposite conclusion. Or suppose the state officials held the advertising was illegal, while the Federal Trade Commission held to the contrary. The majority decision does not recognize state regulation; it destroys it.

The cases cited do not support the majority position. Of course, the Federal government, under the commerce clause, may regulate the flow of lottery devices into a state, regardless of state laws on the subject. The reason is that Congress has never enacted in the lottery field an equivalent of the McCarran Act. It requires a violent stretching of the imagination to find any support in the *Sylvanus* decision. There, the defendant was indicted under a statute prohibiting the use of the mails to defraud. The power of Congress in mail fraud matters does not depend on interstate commerce; it is based on the exclusive Constitutional right to control the mails. Prior to the South-Eastern Underwriters case, immediately after and prior to the McCarran Act, and under the McCarran Act, the result would have been the same. As the Court well expressed it, "This indictment does not have to do with the regulation of the insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception

of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails over which Congress has by the Constitution paramount power and authority."

The McCarran Act arrests the overriding power of the Federal government under the commerce clause as it affects insurance, where the states have regulatory laws. Nowhere does the Act express any intention of doing the same with the power to regulate the mails, the power to enforce due process, or the many other constitutional powers.

To us, the conclusion is inescapable that under the majority view, the McCarran Act accomplished nothing. Courts will not presume that a statute was meant to have no effect. On the contrary, it will be presumed that the legislative body intended to make some change in existing laws, particularly where the whole history shows they intended to remedy what they thought was an existing evil. This rule is usually applied in situations where the over-all intent is not clearly expressed in clear language.

Here, the majority would reverse these well-known rules of statutory construction in order to prove that Congress accomplished nothing. They, in effect, rewrite portions of the McCarran Act as follows:

> That the Congress hereby declares that paramount regulation and taxation by the Federal Government of the business of insurance, rather that the continued regulation and taxation thereof by the several States, is in the public interest.

SEC. 2. (a) The business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business, only to the extent that such laws do not conflict with the paramount Federal power under the commerce clause.

SEC. 2. (b) Any Act of Congress, whether it specially relate to the business of insurance or not, shall be construed to invalidate, impair or suspend any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, whenever the State law conflicts with such Act of Congress. The Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance regardless of any State regulation on the subject.

II

Our second objection to the majority opinion is that it would return the insurance business to the confusion into which it was plunged by the South-Eastern Underwriters decision. The nature and extent of that confusion was well expressed by the dissenting judges. The late Mr. Chief Justice Stone said:

> "* * * And in view of the broad powers of the federal government to regulate matters which, though not themselves commerce, nevertheless affect interstate commerce, *Wickard* v. *Filburn,* 317 U. S. 111; *Polish Alliance* v. *Labor Board, supra,* there can be no doubt of the power of Congress if it so desires to regulate

many aspects of the insurance business mentioned in this indictment.

But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on completion in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in

the briefs and argument or in the Court's opinion.

The late Mr. Justice Jackson said:

> The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.
>
> The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. * * *
>
> It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.

> Also it requires sanctions for obedience far more effective than the $5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of permission to do business therein—a drastic sanction that really commands respect.

The accident and health insurance industry is a large and important one; yet, it is a small part of the business of insurance. This case, under Section 5 of the Federal Trade Commission Act, involves only a matter of advertising. But Section 5 is a comprehensive section which covers many things, such as combinations and restraints under the Sherman Act and at common law, price fixing, and many other things which the Federal Trade Commission might hold to be unfair methods of competition.

As has been frequently said, insurance is a business effected with a public interest. Many years of regulation in 48 states have developed the fact that insurance has some problems peculiar to the business. One is the necessity of maintaining an industry whose financial ability to meet obligations accruing many years in the future will not be undermined by short term considerations. Consequently, the states have asserted their right to regulate the financial policies of the companies licensed to do business in their states, to demand the deposit of certain reserves, to regulate and even limit competition, to fix rates, etc. Some of the regulations permit, or even require, cooperative action among insurance companies which could easily be contrary to the philosophy of the Federal antitrust laws.

In this connection, the majority opinion says:

> However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those state functions, and we do not believe that the Federal Trade Commission Act can be properly interpreted to interfere with the taxing or rate-fixing powers.

We have already called attention to the breadth and extent of the Federal power to regulate the flow of commerce and also to the extensive power under the "affecting interstate commerce" theory to regulate matters entirely within the state which were once thought to be far removed from Federal authority. In South-Eastern Underwriters, the Supreme Court called attention to the many activities of a modern insurance company which involved or affected interstate commerce as we now know it. Such activities are necessarily centered in a home office. From there and to there, flows a constant stream of advertising brochures, policies, applications, statements, rate schedules, directions, etc. These have to do with all the activities of the insurance business and are not restricted to advertising.

In this case, jurisdiction is based on the admitted fact that the respondent sent bundles of advertising matter into states where it was licensed to do business. Actual dissemination of the advertising occurred entirely within the state. Except for the McCarran Act, it is clear this limited proof would sustain paramount Federal jurisdiction. Just how the majority arrive at the conclusion that similar proof would not sustain Federal jurisdiction in taxing and rate-making matters is not clear.

In fact, the decision in *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange, supra,* is to the contrary. That case involved an appeal from a summary judgment of dismissal of a treble damage suit. The dismissal was based upon a determination that the fixing of rates by the National Bureau of Casualty Underwriters for casualty insurance written in the State of Arkansas by the members and subscribers of the Bureau is not violative of the Sherman Act, as amended. The Court adopted the findings of the District Court, one of which was:

> 3. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act. [85 F. Supp. 961, at p. 964.]

The Circuit Court of Appeals affirmed the holding of the District Court that the McCarran Act permitted the State of Arkansas to continue the regulation of insurance in the matter of rate fixing, which regulation, without the McCarran Act, would have violated the Sherman Act.

It is our conclusion that the majority opinion would bring tremendous confusion in the insurance industry and would open the door wide to complete Federal control. We are not discussing the relative merits of Federal versus state control. All we say is that the decision belongs to Congress and not to a Federal bureau.

The hearing examiner, after applying the jurisdictional tests to which we subscribe, concluded that in all states in which respondent was licensed to do business, except Mississippi, state regulation did exist. The hearing examiner then considered the alleged

illegal advertising in Mississippi and concluded that it did not violate the Federal Trade Commission Act.

We have repeatedly pointed out that, under the McCarran Act, the Federal Trade Commission has some jurisdiction in the business of insurance. Within that jurisdiction, and in performance of duties imposed by Congress, 41 complaints have been issued. Where the Commission has jurisdiction, we would hold insurance companies to a high degree of responsibility in their dealings with the public. Consequently, we do not approve of some of the statements made by the hearing examiner in his consideration of the advertising in question.

However, that matter is not now before us. Since the filing of the initial decision, Mississippi has adopted the model code, effective as of February 29, 1956.

The law governing such a situation is clearly expressed in *United Corporation, et al.* v. *Federal Trade Commission* (1940), 110 F. 2d 473, as follows:

> And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future.

In *Chamber of Commerce of Minneapolis, et al.* v. *Federal Trade Commission* (1926), 13 F. 2d 673, the Court said:

> As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the Jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon.

It thus appears that in every state involved in this case, state regulation now prevents further action by the Commission.

In accordance with the views expressed in this dissent, we would deny the appeal and dismiss the complaint.

APRIL 24, 1956.

United States of America

Before Federal Trade Commission

Docket No. 6237

In the Matter of

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, A CORPORATION

ADDITIONAL VIEWS OF COMMISSIONER MASON

The issue here resolves itself basically into that ever fundamental question—states' rights versus centralized government.

Our problem is not the determination of which philosophy is right—that is a legislative function. Our sole duty is to determine which road Congress has directed us to follow in the instant matter.

In my opinion, if the rationale on which the majority bases its decision in this case stands, it must of necessity follow that the Federal Government has

almost unlimited control over the management of the insurance business.

This would apply not only to false advertising of health and accident policies, the present center of our attention in 41 cases, but would include all other aspects of the business of insurance, such as the approval of policy forms, the establishment of rates, the maintenance of reserves, the regulation of agency commissions, and the countless other components of the internal management of any single company or companies.

To transfer in one fell swoop the control of every phase of the business of insurance, whether regulated or not by state law, to the Federal Government when crossing state lines is to flout the expressed intent of Congress.

APRIL 24, 1956.

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SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
NATIONAL CASUALTY COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The question presented is whether an appeal should be allowed from the decision of the United States Court of Appeals for the Sixth Circuit holding that under the McCarran-Ferguson Act (15 U. S. C. 1011-1015) the Federal Trade Commission is without jurisdiction to regulate the advertising practices of the respondent in those states where such practices are regulated by state law.

STATEMENT OF CASE

The only facts as found by the examiner, adopted by the Commission and accepted by the Court of Appeals which are pertinent to the issue involved may be summarized as follows:

Respondent, a Michigan corporation, with its principal office in Detroit, Michigan, is licensed in all of the states of the United States and the District of Columbia to sell its policies of insurance in their respective jurisdictions. All of respondent's insurance is sold by resident agents who live in and are licensed by the States or District in which they sell. No policies are sold by direct mail. Advertising material is furnished by the respondent to its agents who distribute it locally or on occasion have respondent mail it out for them. Most of the jurisdictions in which respondent's policies are sold have statutes extensively regulating its advertising; others regulate less extensively. The Federal Trade Commission, having held by a three to two decision that it had jurisdiction over respondent's advertising practices in all jurisdictions except Michigan irrespective of the existence of State statutes regulating such practices, found it unnecessary to make any finding as to whether there were any jurisdictions in which respondent sold insurance which did not have such statutes. On review the Court of Appeals held that under the McCarran-Ferguson Act the Federal Trade Commission was without jurisdiction to regulate respondent's advertising practices in those states where such practices are regulated by state law and remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Sixth Circuit is correct and in conformity with applicable decisions of this Court and of Courts of Appeals of other circuits and is not in conflict with any other decision so as to warrant further review of this case by this Court.

In 1944 the long established and intricate system of State regulation of the business of insurance was convulsed by the decision in *United States v. South-Eastern Underwriters Association,* 322 U. S. 533, which discarded a long line of decisions and declared that the business of insurance, when conducted across state lines, involved interstate commerce and was therefore subject to Federal regulatory statutes (in that case, the Sherman Act).

The following year Congress attempted to set at rest the problems raised by this decision by passing the McCarran-Ferguson Act, 15 U. S. C. 1011-1015, which in the introductory section declared "that th econtinued regulation and taxation by the several States of the business of insurance is in the public interest" and then in Section 2 provided first that "the business of insurance * * * shall be subject to the laws of the several States" and second that:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, [to which date a complete moratorium was provided in Section 3] * * * the Sherman Act, * * * the Clayton Act, and * * * the

> Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." (Bracketed material ours.)

Supreme Court Decisions. The first case to reach the Supreme Court involving the McCarran-Ferguson Act was *Prudential Insurance Company v. Benjamin*, 328 U. S. 408 (1946), involved the right of the State of South Carolina to impose a discriminatory license tax on foreign insurance companies. In holding the tax valid this Court, at pages 429-431, defined the meaning and intent of the McCarran-Ferguson Act as follows:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.
>
> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power be-

hind the state systems, notwithstanding these variations.

* * * * *

"* * * it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

In *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U. S. 310 (1955), in which this Court declined to apply federal admiralty rules to the interpretation of a maritime insurance policy, Mr. Justice Black, in reviewing the enactment and effect of the McCarran-Ferguson Act, made the following statements at pages 319 and 320:

"Passage of the bill followed *United States v. South-Eastern Underwriters Association, supra,* holding that, despite the Constitutional Doctrine embodied in the *Paul v. Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the South-Eastern case, however, all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue.

* * * * *

"Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where Congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the States."

Courts of Appeals Decisions. Following the law as settled by the above cited decisions of this Court the Courts of Appeals have acted with complete unanimity in holding that under the McCarran-Ferguson Act the right to regulate the business of insurance is reposed in the states and in those states which have adopted regulations the Sherman Act, the Clayton Act and the Federal Trade Commission Act are not applicable.

In *North Little Rock Transportation Company v. Casualty Reciprocal Exchange,* 181 F. 2d 174 (1950), the Court of Appeals for the Eighth Circuit, in holding that inasmuch as Arkansas by statute regulated the fixing of insurance rates the Sherman Act was not applicable, said at page 176:

> "The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce."

Application for writ of certiorari to review this decision was denied by this Court, 340 U. S. 823.

In *Crafts v. Federal Trade Commission,* 244 F. 2d 882, the Court of Appeals for the Ninth Circuit on February 27, 1957, in an action involving the Fireman's Fund Indemnity Company identical with that of the instant case, ruled that under the McCarran-Ferguson Act the power of the Federal Trade Commission over insurance advertising is limited and, therefore, a subpoena issued by the Commission for the production of all advertising matter used by the Fireman's Fund Indemnity Company without regard to the area or jurisdictions in which the advertising was used, is invalid. The Federal Trade Commission has applied for a writ of certiorari to review that decision.

In *American Hospital and Life Insurance Company v. Federal Trade Commission,* 243 F. 2d 719, the Court of Appeals for the Fifth Circuit on April 9, 1957, rendered its decision on the identical issue involved in the case at bar holding that under the McCarran-Ferguson Act the Federal Trade Commission was without jurisdiction to regulate insurance advertising in those states which had enacted laws for the regulation of false and deceptive advertising. The Federal Trade Commission has also applied for a writ of certiorari to review this decision.

Congressional Debates. The decisions of the Courts in the instant case and the above cited cases are in complete accord with the statements made by the Senate managers and others during the debates on the McCarran-Ferguson Act.

> "Mr. McCarran: During the three year moratorium the states may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate, they will have taken the business of insurance in the respective states out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts" (91 Cong. Rec. 1443).
>
> • • • • •
>
> Mr. Ferguson: "After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. But insofar as the State is concerned, which has specifically legislated on the subject, the three acts shall not apply" (91 Cong. Rec. 1444).
>
> • • • • •
>
> Mr. Ferguson: "There is no attempt here to have Congress throttled in the future in acting upon insurance legislation. Subsection (b) of Sec-

tion 2 provides that if Congress does act, the act shall specifically relate to the business of insurance.

"Mr. O'Mahoney: That is correct.

"Mr. Ferguson: What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law in the books relating in some way to interstate commerce, it would not apply to insurance. We wanted to make sure that Congress would act specifically with reference to insurance in enacting the law.

"Mr. O'Mahoney: In other words, no existing law and no future law should, by mere implication, be applied to the business of insurance.

"Mr. Ferguson. That is correct" (91 Cong. Rec. 1487).

* * * * *

"Mr. Barkley: I am not uneasy about the situation. I do not believe that hereafter the Congress will not have full authority to deal with the subject if the States do not do so" (91 Cong. Rec. 1488).

CONCLUSION

The ruling in the instant case is that the Federal Trade Commission is without jurisdiction to regulate the insurance business of the respondent in those states where such business is regulated by state law.

This ruling is in conformity with the law as settled by this Court and with the decisions of the Courts of Appeals of other circuits which have ruled thereon. Review of this case is therefore not warranted and the petition for writ of certiorari should be denied.

Respectfully submitted,

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September, 1957.

SUPREME COURT, U. S.

APR 9 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION,
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NATIONAL CASUALTY COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL CASUALTY COMPANY

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BRIEF FOR THE NATIONAL CASUALTY COMPANY

QUESTION PRESENTED

UNDER THE McCARRAN-FERGUSON ACT IS THE FEDERAL TRADE COMMISSION ACT APPLICABLE TO THE BUSINESS OF INSURANCE IN THOSE STATES WHICH HAVE ENACTED LAWS REGULATING UNFAIR AND DECEPTIVE PRACTICES OF INSURANCE COMPANIES?

STATEMENT OF THE CASE

The Petitioner's statement of the material facts is accurate except that it fails to state that Respondent, National Casualty Company, is licensed to do business in each of the States in which it sells insurance and that all local agents through whom all of Respondent's insurance is sold are licensed under the insurance laws of the particular State in which they engage in business (N. R. 22, 32).

SUMMARY OF ARGUMENT

In 1944 a decision of this Court holding that insurance was commerce and therefore when it crossed the State line was interstate commerce, cast doubt on the system which the States had built up over a period of many years for the regulation of insurance free from interference by the Federal government. Congress promptly passed the McCarran-Ferguson Act restoring this authority to the States, placing a three-year moratorium on the operation of certain Federal Acts, including the Federal Trade Commission Act, ordinarily applicable to interstate commerce, so that any States which had not already done so would have an opportunity to enact laws regulating the matters covered thereby, and also provided that at the end of the moratorium period the Federal Trade Commission Act and the other named Acts "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The lower Court has held that in the States which have enacted laws regulating unfair and deceptive prac-

tices of insurance companies the Federal Trade Commission Act which deals with the same subject is inapplicable.

The Petitioner concedes that under the above quoted proviso the Federal Trade Commission Act would be inapplicable in the event of a conflict with State laws, but says that the McCarran-Ferguson Act did not intend to make the Federal Trade Commission Act inapplicable where there is no conflict with the State law, but rather intended that there would be a dual control in this area of the insurance business by both the Federal and State agencies.

Petitioner also claims that Congress did not intend that the States could acquire exclusive authority to regulate deceptive and unfair practices of insurance companies by merely enacting laws regulating such practices, but on the contrary intended that the Federal Trade Practices Act would remain applicable until such time as the several States took formal action under their laws pertaining to the particular transaction or practice in question and entered a formal order adjudicating the particular matter.

Respondent says that each of these arguments is entirely without foundation, that they do violence to the language of the McCarran-Ferguson Act and are in direct conflict with the language, purpose and legislative history thereof; moreover, the Petitioner's theory if adopted would lead to a serious impairment of State regulation.

ARGUMENT

UNDER THE McCARRAN-FERGUSON ACT THE FEDERAL TRADE COMMISSION ACT IS NOT APPLICABLE TO THE BUSINESS OF INSURANCE IN THOSE STATES WHICH HAVE ENACTED LAWS REGULATING UNFAIR AND DECEPTIVE PRACTICES OF INSURANCE COMPANIES.

Introduction

Until 1944 the Supreme Court in a long line of decisions from *Paul v. Virginia* 8 Wall. 168, to *New York Life Insurance Co. v. Deer Lodge County,* 231 U. S. 495, had held that the business of insurance was not commerce, and, therefore, even though it crossed state lines it was not within reach of the commerce clause of the Constitution. Consequently the individual states had, without any restrictions from the Federal government, assumed the responsibility of regulating such business, and, in the course of doing so, had built up a vast amount of experience, laws and regulations. In 1944 the United States Supreme Court in *United States v. South-Eastern Underwriters Ass'n,* 322 U. S. 533, reversed its prior decisions and held that the business of insurance was commerce and that when its activities crossed the state line it was engaged in interstate commerce, and, therefore, subject to Federal regulations, and, specifically, that it was subject to the Sherman Act.

I.

THE PROVISO IN SECTION 2(b) OF THE McCARRAN-FERGUSON ACT CANNOT PROPERLY BE CONSTRUED, AS CONTENDED BY THE PETITIONER, TO MEAN THAT THE FEDERAL TRADE COMMISSION ACT SHALL BE APPLICABLE TO THE BUSINESS OF INSURANCE IN STATES IN WHICH SUCH BUSINESS IS FULLY REGULATED BY STATE LAW IF SUCH LAW IS NOT IN CONFLICT WITH THE FEDERAL TRADE COMMISSION ACT.

A. Language and Purpose of the McCarran-Ferguson Act.

The proviso to Section 2(b) states that after January 1, 1948, the Federal Trade Commission Act "shall be applicable to the extent that such business is not regulated by State law." This language seems both simple and clear. It says that if the matter *is not* regulated by State law the Federal Trade Commission Act is to apply, but if it *is* regulated by State law the Federal Trade Commission Act is not to apply.

There is no language in the proviso which could be construed to require that the State law must be in conflict with the Federal law in order to make the proviso operative. Had Congress intended any such substantial restriction in the proviso it certainly could and would have used language expressing such an intent.

The interpretation requested by Petitioner not only does violence to the express language of the Act but also to the purpose for which it was enacted.

The South-Eastern Underwriters decision not only cast doubt on the validity of the numerous State laws under which the insurance business had been regulated in the past, but also created problems with respect to the various

Federal statutes which pertained to commerce generally but which Congress had adopted without having insurance in mind. Congress enacted the McCarran-Ferguson Act to eliminate this confusion. In Section 1 it declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest" and in Section 2(a) it made that business subject to the State regulatory laws.

Having expressed in Sections 1 and 2(a) the clear and obvious intent to repose in the several States not only the authority but also the full and complete responsibility for the regulation of this business, Congress wanted to make certain that the business would be regulated within the areas covered by the Statutes named in Section 3(a) and the proviso of Section 2(b) and therefore specifically made the named acts inoperative for a period of three years during which the States could revise their laws to undertake that responsibility and eliminate the possibility of a regulatory void in those areas. To the extent that the States did so, the Federal Acts would not become applicable at the end of the three-year moratorium.

To assume, as the Petitioner apparently does that Congress intended the moratorium as an invitation to the States to adopt only conflicting legislation if they wished to assume full regulatory responsibility is a reflection on the intelligence of Congress. The Federal Trade Commission Act makes unlawful "unfair or deceptive acts or practices in commerce," and the Petitioner frankly admits that "it is inconceivable that any State would enact a Statute affirmatively sanctioning false advertising" (Pet. Br. 37, fn. 24).

If it was Congress' intention, as the Petitioner contends, to grant to the Federal Trade Commission concurrent juris-

diction with the States to enforce its law proscribing unfair or deceptive acts or practices in commerce irrespective of whether or not the States enacted laws regulating such practices, then why was the Federal Trade Commission Act included in the moratorium provided in Section 3 and made inapplicable for a period of three years? Surely Petitioner is not going to contend that on the date of the enactment of the McCarran-Ferguson Act in 1945 any States had laws sanctioning false advertising or in any other way conflicting with the Federal Trade Commission Act and Petitioner concedes that it is inconceivable that they would adopt such a law. Surely if it was the intention of Congress to make the Federal Trade Commission Act applicable to the business of insurance at the end of three years, irrespective of the adoption of similar laws by the States, then surely there would have been no reason for not permitting it to be enforced immediately in both the States which already had similar laws as well as in those which had none. The placing of the Federal Trade Commission under the moratorium is strong proof of Congress' plain intent as expressed in the words of the Act, which was that the Federal Trade Commission Act, as well as the other Acts named, would not become applicable if the States accepted their responsibility by enacting laws regulating the business of insurance in the areas covered by those Acts leaving it entirely up to the several States to determine the method and type of regulation which they considered to be best adapted to their own particular needs.

In the Congressional debates on the McCarran-Ferguson Act,[1] in which the effect of the proviso in Section 2(b) was discussed at great length, in no instance did anyone indicate

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[1] 91 Cong. Rec. 478-488, 1027-1028, 1085-1093, 1395-1396, 1442-1444, 1477-1489.

or imply in any manner that applicability of the Federal Trade Commission Act and the other Acts at the end of the moratorium period would in any way turn on whether the State laws were contrary to or harmonious with the Federal Acts, though the authors and managers of the bill repeatedly made the flat unqualified statement that, under the Section 2(b) proviso, the Federal Trade Commission Act and other acts mentioned would not apply in the areas in which the States have enacted laws.[2]

The Petitioner on page 59 of its Brief quoted a statement made by Senator Ferguson that "if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding," and at page 64 of its Brief it seeks to draw the conclusion that Senator Ferguson meant that only a conflicting State law would make the Federal Acts inapplicable. No such conclusion is justified. Senator Ferguson was merely answering a question addressed to him by Senator Pepper as to what the result would be in the event of the enactment of State laws not in harmony with the Federal laws (91 Cong. Rec. 1481). There is nothing in his reply to indicate the result would be otherwise in case of the enactment of harmonious State laws and Senator Ferguson, like all of the others who spoke on the subject, flatly stated that the meaning of Section 2(b) was that:

> "After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. *But insofar as the State is concerned which has specifically legislated on the subject, the three acts*

[2] See *infra* page 17 for quotations from Congressional Record.

shall not apply." (Emphasis added.) (91 Cong. Rec. 1443.)

B. The Petitioner's Theory of Dual Control Would Inevitably Result in Conflict Between State and Federal Agencies and Would Impair State Regulation.

Petitioner's claim that the McCarran-Ferguson Act makes a distinction between State legislation conflicting with and State legislation not conflicting with the Federal Trade Commission Act is undoubtedly due to the predicament in which it finds itself after being forced to concede, as it now belatedly does, that in the event of a conflict between a Federal law and a State law pertaining to the business of insurance, the State law would prevail and the Federal law would not become operative (Pet. Br. 23, 37-39, 49, 55). In both *North Little Rock Transportation Company v. Casualty Reciprocal Exchange*, 181 F. 2d 174 (C. A. 8), certiorari denied, 340 U. S. 823, and *Miley v. John Hancock Mutual Life Insurance Company*, 148 F. Supp. 299, affirmed *per curiam*, 242 F. 2d 738 (C. A. 1), certiorari denied, 355 U. S. 828, the courts unequivocably held that under Section 2(b) of the McCarran-Ferguson Act the Sherman Act was inapplicable to insurance business which was regulated by State law. Petitioner while agreeing with the decisions in these cases asserts that they can be distinguished because the State "statute specifically sanctioned the very practice in question" whereas in the case at bar "the state statutes and the federal act are entirely consistent and complementary" and "it is most unlikely that a conflict would ever arise" (Pet. Br. pp. 37-38 and fn. 24, p. 37).

There are two answers to this. First, as we have already demonstrated, the Act itself makes no such distinction.

Second, although the language of the Federal and State laws pertaining to deceptive and unfair practices may be similar in that they both prohibit unfair or deceptive acts or practices, it would indeed be naive and unrealistic to believe that there would not be conflicts in their administration and application to particular facts and circumstances.

In *Federal Trade Commission v. Rubberoid Company*, 343 U. S. 470, 483, Mr. Justice Jackson, in a dissenting opinion, described with great clarity the scope and extent of the broad authority delegated to administrative agencies to interpret and administer such complicated and vague regulatory acts as the Federal Trade Commission Act. The following are but a few short excerpts:

> Page 483—"By the Act, nothing is commanded to be done or omitted unconditionally and no conduct is per se punishable."
>
> Page 484 —"It is typical of instances where Congress cannot itself make every choice between possible lines of policy."
>
> Page 486—"The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediencies or conflicting guides, and so leaves the rounding out of its command to another, smaller and specialized agency.
>
> "It is characteristic of such legislation that it does not undertake to declare an end result in particular cases but rather undertakes to control the processes in the administrator's mind by which he shall reach results. Because Congress cannot predetermine the weight and effect of the presence or absence of all of the competing considerations or conditions which should influence decisions regulat-

> ing modern business, it attempts no more than to indicate generally the outside limits of the ultimate result and to set out matters about which the administrator must think when he is determining what within those confines the compulsion in a particular case is to be."

This description of the functions of the Federal Trade Commission of course applies equally to the State agencies charged with administering similar State statutes, and the Petitioner so concedes (Pet. Br. 54). When Congress enacted the McCarran-Ferguson Act and invited the several States to enact their own laws regulating insurance in the area covered by the Federal Trade Commission Act, it was obviously authorizing them to set up similar administrative agencies and thereby assume the full responsibility and functions of that Commission in the area of unfair and deceptive practices in connection with the business of insurance. The States have admittedly enacted such statutes and set up such agencies. They have fully and completely taken over the responsibility entrusted to them by Congress and only Congress has the authority to take it back.

The Petitioner concedes that the intent and meaning of the McCarran-Ferguson Act is that the Federal Trade Commission Act cannot "be applied so as to override state policy specifically expressed either in statutes *or administrative action*" (Pet. Br. 39).

In an area as broad and vague as the regulation of unfair and deceptive practices, it is inconceivable that the Petitioner can seriously contend that there would be no conflict between the administration of the Federal Act and the various State Acts. In Petitioner's brief filed with the Court of Appeals for the Sixth Circuit he frankly stated at page 71:

> "A State might conceivably hold that some of [respondent's] advertising practices found by the Commission to be false and misleading do not violate the State statute. To this extent a conflict *might* arise between the administration of the Federal Trade Commission Act and the administration of the State statute."

Petitioner devotes a whole section of its brief to this Court to the argument that there is no conflict between the State and Federal laws "either in the Statutes themselves or in their administration" (Pet. Br. 35-41), but then in another section of his brief he casts doubt on the sincerity of his whole argument by stating that "Presumably conventional rules of *res judicata* would eliminate any possibility of conflicting judgments or orders" (Pet. Br. 50, fn. 32).

In *Garner v. Teamsters, Chauffeurs and Helpers, Etc.*, 346 U. S. 485, 490-491, this Court said:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The two actions which are being jointly heard on this appeal themselves demonstrate the probability of conflict in interpretation, for in both cases the Commission found certain advertising to be unfair and deceptive which the examiner had found to be not unfair or deceptive (Pet. Br. 9, 11, 13-15).

Under the Petitioner's theory there could be no conflict in the dual administration of the State and Federal laws unless and until the State took formal action and entered a final order adjudicating the fairness or unfairness of each and every piece of advertising or literature used by an insurance company. This of course would not only seri-

ously impair and conflict with the right of the States to enforce its Statute and regulate unfair and deceptive advertising by other than formal proceedings and adjudications, but also overlooks the possibility that the State agency has examined the material and concluded that it is not unfair or deceptive. Such a dual administration over unfair practices in the business of insurance would not only result in conflict between the State and Federal agencies in the administration of their laws but would also seriously impair the enforcement of the State laws in direct violation of Section 2(b) of the McCarran-Ferguson Act by permitting the Federal Trade Commission to dictate the method and means of enforcement to be used by the States.

In *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, 429-430, this Court, spaking of the McCarran-Ferguson Act, said:

> "Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance."

After referring to the existence of State systems of regulation and taxation and to the fact that they differed greatly in scope and character, it then stated:

> "Congress could not have been unacquainted with these facts and its purpose was to throw the whole weight of its power behind the State systems, notwithstanding these variations."

In *Maryland Casualty Company v. Cushing*, 347 U. S. 409, 413, this Court again speaking of the McCarran-Ferguson Act, said:

> "Suffice to say that even a most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counter-

> act any adverse effect that this Court's decision in *United States v. South-Eastern Underwriters Asso.*, 322 U. S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 might be found to have on State regulation of insurance."

In *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U. S. 310, 319, this Court said:

> "In the South-Eastern case, however, all the opinions had emphasized the historical fact that States had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing State power to regulate insurance would continue."

If the McCarran-Ferguson Act restored to the States the exclusive right to regulate the unfair and deceptive practices of insurance companies only if the State regulations are in conflict with the Federal regulations, then, of course, the Act would not have succeeded in counteracting the adverse effect of the South-Eastern decision, the States would not be restored to the position they were in prior to South-Eastern decision, and the weight of Congress' power would be used to impair and destroy the regulatory systems of the several States in this area rather than to support them.

The Petitioner argues that "there would seem to be no substantial reason why the Federal and State governments should not both have jurisdiction" over the same transaction, and cites cases involving the Federal Power Act to show that complementary regulation is not unusual. They are not in point and do not involve a provision even remotely similar to the proviso contained in the McCarran-Ferguson Act. In fact in the Federal Power Act (16 U. S. C. 791 *et seq.*), as in the Natural Gas Act, (15 U. S. C. 717, *et seq.*), there is an express grant of authority to the Fed-

eral Power Commission over a specific area, and a sharp line of demarcation is drawn between the area occupied by the States and the area occupied by the Federal Power Commission. Under the Federal Power Act and the Natural Gas Act there is no concurrent or dual control imposed on the same transactions as Petitioner claims was intended by Congress under the McCarran-Ferguson Act.

II.

THE PROVISO IN SECTION 2(b) OF THE McCARRAN-FERGUSON ACT CANNOT PROPERLY BE CONSTRUED, AS CONTENDED BY THE PETITIONER, TO MEAN THAT THE FEDERAL TRADE COMMISSION ACT SHALL NOT BE MADE INAPPLICABLE BY THE MERE ENACTMENT OF STATE REGULATORY LAWS PERTAINING TO UNFAIR AND DECEPTIVE PRACTICES OF INSURANCE COMPANIES, BUT SHALL REMAIN APPLICABLE UNTIL THE STATE LAW IS APPLIED AND ENFORCED IN A PARTICULAR SITUATION BY THE ENTRY OF AN ORDER ADJUDICATING THE MATTER.

Petitioner's final argument is that when Congress inserted the proviso in Section 2(b) of the McCarran-Ferguson Act that "the Federal Trade Commission Act, as amended, is not applicable to the business of insurance to the extent that such business is not regulated by State law," they did not intend that the several States could make the Federal Trade Commission Act inapplicable by merely enacting laws regulating unfair and deceptive practices in the business of insurance, but on the contrary intended that the Federal Trade Commission Act would remain applicable to any act or practice which the Federal Trade Commission considered to be unfair or deceptive until such time as the several States took formal action pertaining to the particular act or practice in question and entered formal

orders thereon adjudicating the particular matter (Pet. Br. 24-27, 49-55, and fn. 32, p. 50).

A. Language and Purpose of the McCarran-Ferguson Act.

The first answer to this is that the language of the proviso, which is both plain and simple, says no such thing. How can the words "regulated by State law" be construed to mean anything other than the enactment by the several States of laws regulating insurance companies? And, of course, the word "extent" refers to the area or field occupied by the three acts named which, so far as the Federal Trade Commission Act is concerned, covers the area of unfair and deceptive practices.

In short, Congress said that if unfair and deceptive practices of insurance companies are not regulated by State law the Federal Trade Commission Act is to apply, but if such practices are regulated by State law the Federal Trade Commission Act is not to apply.

The States did proceed to enact laws which Petitioner concedes are virtually identical with the Federal Trade Commission Act (Pet. Br. p. 36). But Petitioner argues that this does not comply with the mandate of Congress and that the insurance business cannot be considered as "regulated by State law" until the State law has been applied and enforced and an order entered in individual cases (Pet. Br. 49-50 and 55).

Congress of course always retains the right to amend the law and return to its own control the regulation of the business of insurance if it feels that the States have not fully assumed and carried out the responsibilities entrusted to them by failure to enforce the regulating laws which they have enacted, but surely there is nothing in the Act

to indicate that they have delegated the authority to make this determination to the Federal Trade Commission.

Although Congressional debates sholud not be resorted to when the meaning is clear from the plain and unmistakable terms of the Statute *(Osaka Shosen Kaisha Line v. United States,* 300 U. S. 98), nevertheless a few short excerpts from Senate debates on the Conference Report on the McCarran-Ferguson Act show conclusively that Congress had in mind specifically the enactment of laws by the states in the areas occupied by the Sherman, Clayton and Federal Trade Commission Acts.

> Senator McCarran: "During the moratorium regulatory acts *must be enacted* by the several States. Otherwise the antitrust acts become effective after January 1, 1948." (Emphasis added.) (91 Cong. Rec. 1442.)
>
> Senator McCarran: "During the three-year moratorium the States may, if they see fit to do so, *enact legislation for the purpose of regulation. If they do enact such legislation,* to the extent that they regulate, they will have taken the business of insurance in the respective States out from under the Sherman Anti-Trust Act, the Clayton Act, and the other Acts. If during the moratorium the States *do not enact legislation for regulatory purposes,* then on January 1, 1948, the Sherman Act, the Clayton Act, and the other Acts will become immediately applicable." (Emphasis added.) (91 Cong. Rec. 1443.)

Similar statements were made by Senator Ferguson and are set forth at page 8 *supra.*

These clear indications of Congressional intent are in direct conflict with the Petitioner's argument that Congress intended anything more than the enactment by the

States of regulatory laws covering the area of the three Acts mentioned, and also with Petitioner's argument that Congress intended that only a conflicting State law would render the Federal Trade Commission Act inapplicable.

B. There Is No Legal Vacuum Under the State Regulatory Laws So Far As Respondent Is Concerned.

Petitioner also argues that unless the Federal Trade Commission is permitted to regulate the interstate activities of insurance companies in the area of unfair and deceptive practices, there would be "a legal vacuum—a 'no man's land' which is not effectively regulated either by the States or by the Federal government" (Pet. Br. p. 43), and that this is necessarily true because a State law is not enforceable beyond its own borders (Pet. Br. 41-49).

In the case at bar the Respondent is not only licensed to do business in every State in which it advertises and sells insurance, but also sells only through agents each of whom resides in and is licensed by the particular State in which he sells insurance. It is also undisputed that each and every one of those States has a law regulating false and deceptive practices in connection with the sale of such insurance. Under these facts what difference can it possibly make whether the advertising or the insurance policy originates elsewhere? The evil of false advertising is its impact on the person purchasing the insurance, and the State in which the policy is purchased is the jurisdiction which can most effectively regulate and control any deceptive practices used by the seller. A State's laws need no extra-territorial application to effectively protect its own citizens from deceptive practices used by an insurance company which must be licensed by the State before it can sell its policies within the State and whose agents handling the sales within the State must also be so licensed.

Under the State laws regulating deceptive practices such licenses can be revoked by the State Insurance Commissioner upon violation of any cease and desist orders pertaining to deceptive practices (Pet. Br. 78-79).

In *Travellers' Health Assn. v. Virginia*, 339 U. S. 643, 652, this Court said:

> "Any doubts about the power of a State to exclude an interstate insurance company which refuses to comply with its regulatory laws, were dispelled by the passage of the McCarran Act."

What type of power or what penalty could be more effective? As Mr. Justice Jackson pointed out in *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533, 590-591, fn. 11:

> "Violations of State laws are commonly punishable by cancellation of permission to do business therein—a drastic sanction that really commands respect."

The Petitioner also discusses the problems involved where an insurance company is not itself licensed and does not do business through local agents licensed in the State where its policies are advertised and sold. (Pet. Br. 47-48). We do not discuss those questions because they are not before the Court in the case at bar and have no application to Respondent, which was licensed in all States and sold its insurance only through agents who were also licensed by their respective States. Under the facts in the case at bar the States can, under the laws enacted by them, effectively regulate the business of insurance and deceptive practices pertaining thereto, and all of Respondent's practices are within the jurisdiction and control of such laws.

Petitioner may, of course, if it wishes, question the wisdom of Congress in depriving the Federal Trade Com-

mission of its authority over the business of insurance and favoring exclusive regulation in that area by the several States, but surely a system of dual controls over the same transactions, in the form suggested by Petitioner, was never contemplated by Congress and could only have resulted in the utmost confusion and the complete disintegration of the State regulatory systems. The impossibility of concurrent control by State and Federal authorities over the same subject matter (operation of a railroad) was pointed out by this Court in *Southern Railway Company v. Reid*, 222 U. S. 424, in which the Court said:

> "If the regulation be not exclusive, this situation is presented: If the carrier obey the State law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the State law. Manifestly one authority must be paramount, and when it speaks the other must be silent."

Under the facts in the instant case, at the invitation of Congress as expressed in the McCarran-Ferguson Act, the States have spoken by the enactment of laws regulating unfair and deceptive practices in the business of insurance, and having so spoken the Federal Trade Commission must be silent.

We submit that type of dual control now proposed by the Federal Trade Commission in which the first agency to issue an order would control is not only in complete variance with the terms of the Act but if accepted would place the whole industry in a state of complete confusion and conflict.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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April, 1958.

Nos. 435 and 436

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE FEDERAL TRADE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

No. 436

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit in No. 435 (N. R. 216–225)[1] is reported at 245

[1] The designation "N. R." refers to the printed record in No. 435, *Federal Trade Commission* v. *National Casualty Company*, and the designation "A. R." refers to the printed record in No. 436, *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*.

F. 2d 883. The opinion of the Court of Appeals for the Fifth Circuit in No. 436 (A. R. 110–117) is reported at 243 F. 2d 719. The opinions of the Federal Trade Commission in No. 435 (N. R. 204–210) and in No. 436 (A. R. 68–87), and the dissenting opinions of Commissioners Gwynne and Mason in No. 436 (A. R. 87–108), are not yet reported.

JURISDICTION

The judgment of the Court of Appeals in No. 435 was entered on June 6, 1957 (N. R. 216). The time for filing a petition for writ of certiorari was extended by Mr. Justice Brennan on August 23, 1957, to September 6, 1957 (N. R. 225). The judgment of the Court of Appeals in No. 436 was entered on April 9, 1957 (A. R. 117–118). The time for filing a petition for certiorari was extended by Mr. Justice Black on June 27, 1957, to September 6, 1957 (A. R. 118). The petitions for writs of certiorari were filed on September 6, 1957, and were granted on November 12, 1957. 355 U. S. 867. The jurisdiction of this Court arises under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) authorizes the Federal Trade Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. The question presented is whether the McCarran-Ferguson Act (15 U. S. C. 1011–1015) is to be construed as divesting the Commission of jurisdiction over false and misleading advertising in connec-

tion with the interstate sale of insurance upon the mere enactment of state laws prohibiting such practices within the boundaries of the states involved.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45, provides in part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 70 Stat. 908, 15 U. S. C. 1011–1015 (herein referred to as the McCarran-Ferguson Act), provides:[2]

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[2] The only changes effected by the amendments were the substitution in Sections 2 (b) and 3 (a) of the words "June 30, 1948" for the words "January 1, 1948," and the addition in Section 5 of the word "Guam."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robin-

son-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 5. As used in this Act, the Term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam and the District of Columbia.

STATEMENT

The complaints issued by the Commission against the two respondents, the National Casualty Company and The American Hospital and Life Insurance Company, charged that the companies had, in the course of their interstate business of selling accident and health insurance, falsely advertised their insurance policies and thereby violated the Federal Trade Commission Act (N. R. 2–9, 14–15; A. R. 5–10). Each respondent filed an answer in which it admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading and denied that it had violated the Federal Trade Commission Act

(N. R. 11–14; A. R. 12–22). Each respondent affirmatively alleged in its answer that under the McCarran-Ferguson Act the Commission was without jurisdiction over the respondent's interstate insurance business because of the enactment of state statutes prohibiting unfair or deceptive acts or practices within the states involved (N. R. 11–12; A. R. 12–13).

NO. 435

The facts. National is a Michigan corporation with its principal place of business in that state (N. R. 188). It is engaged in selling health, accident, and all types of casualty insurance and is licensed to sell such insurance in all states, the District of Columbia, and Hawaii. The challenged representations relate only to its accident and health insurance business, from which it received premiums of more than $15,000,000 in 1953 and more than $16,000,000 in 1954 (N. R. 188).

National sells its insurance policies through the solicitation of from 350 to 400 direct but independent insurance agents throughout the nation (N. R. 188). National prepares and sends interstate to these agents direct mailing cards, stuffers, one-page lead sheets, form letters, applications with tear sheets, and throwaways. Most of this material is shipped by mail to the agents in bulk (N. R. 188). The agents disseminate the material locally either by mail or personal distribution (N. R. 189). Something less than 5% of National's advertising material, however, is disseminated by mail directly from National's offices in

Detroit to the public on behalf of its agents (N. R. 188).

Eighty per cent or more of National's accident and health policies are issued by it from its home office after receipt, checking, and consideration by it of the prospect's signed application previously secured by the agent. Policies issued are forwarded to the agent for delivery to the insured. A limited number of agents may issue policies directly, but National has the right to reject such policies after consideration of the application and policy which have been forwarded to it by the issuing agent (N. R. 189).

The examiner's decision. The examiner grouped the challenged representations into five categories: (1) misrepresentations as to the continuation of the policies after purchase;[3] (2) misrepresentations as to the

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[3] Under this category, the examiner found that National represented the following: "No increase in premium because of age. * * * No decrease in benefits because of age. * * * Lifetime accident benefits. * * * For employed men and women ages 16 to 69 years inclusive. * * * Life indemnity accident coverage. * * * For individuals or family groups—ages 1 day to 69 years. * * * Security plan with lifetime benefits. * * * I understand this peace of mind and security will be mine from the first day—even for life. * * * We have removed all age termination limits from the policy" (N. R. 190).

The examiner found that National's policies "all provide that they may be terminated" by National at its option at the end of any premium period, and that two of its policies provide that they "may be cancelled at any time" by National. The examiner held that the representations are deceptive and misleading in that "these statements can reasonably be expected to give a substantial number of readers the definite impression that the policy will continue in effect so long as premiums are paid at least until age 69, or even for life, with full indemnification" (N. R. 191).

required physical condition of the insured;[4] (3) misrepresentations as to the extent of coverage;[5] (4) misrepresentations as to the dollar amounts payable

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[4] With respect to this category, National advertised the following: "No medical examination required." The examiner found that National's policies all provide that no benefits will be paid for loss resulting from sickness, the cause of which is traceable to a condition existing prior to or within a certain number of days (usually 15 or 30) after the effective date of the policy, and that National shall have the right and opportunity "to examine the person of the insured when and as often as it may reasonably require" during the pendency of any claim under the policy. National's accident policies require that "the loss shall result directly and independently of all other causes," to show which the insured may have to submit to medical examination. The examiner held that the representation that no medical examination is required carries the definite impression that National "insures without regard to the prospect's physical condition either before or after issuance of the policy," and that since this is not the fact the representation is misleading and deceptive (N. R. 191–192).

[5] Under this category, National advertised as follows: "The most complete and broadest coverage at the lowest rates. * * * Monthly benefits up to $300 per month paid from first day of sickness or accident plus $300 per month for hospitalization. * * * Hospital room and board for 100 days for each sickness or accident. Your choice of plans paying from $5 to $12.50 per day. Pays full benefit if your hospital room costs less. * * * Guaranteed monthly income for sickness. * * * Guaranteed monthly income for accidents. * * * When I am sick $600 a month as long as three months. * * * New Modern all-inclusive hospital surgical nurse protection. * * * Occupational and non-occupational accidents fully covered. * * * Full coverage on or off the job. * * * Full coverage for female diseases. * * * You should be fully protected against these expenses" (N. R. 192).

The examiner found that National's policies "contain exclusions and limitations which belie 'most complete' or 'broadest coverage' 'fully protected', 'first day of sickness', etc." (N. R. 192–193). The examiner held that the discrepancies in this re-

for operations;[6] (5) misrepresentations as to the time periods for which monthly benefits would be paid.[7] The examiner found that National's policies were deceptively advertised as charged except for category number four.

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spect between the promises of the advertising and the provisions of the policy "may well be reasonably expected to give a prospect an impression of wider and fuller coverage than he gets," and that the advertising representations are "deceptive and misleading" (N. R. 193).

[6] Under this category, National advertised as follows: "Surgical Operations, whether performed in or out of the hospital, are paid up to $300, IN ADDITION TO HOSPITAL BENEFITS. Full benefits are paid to all insured members of the family group. * * * SURGERY BILLS from $5 to $300 for sickness or accident. * * * Pays surgical operation expenses up to $300. * * * Surgical plan—to $300. * * * Three choices of surgical operation benefits $5 to $150, $7.50 to $225, $10 to $300. * * * Your Doctor Bills Paid AT HOME, AT HOSPITAL, AT YOUR DOCTOR'S OFFICE. * * * $10 to $300 Available Surgical Operation Fees. * * * Pays surgical operation fees up to $150. * * * Who pays These Bills? YOU SHOULD BE FULLY PROTECTED AGAINST ALL THESE EXPENSES. * * * NEVER BEFORE HAS SUCH PROTECTION BEEN OFFERED" (N. R. 193–194, 208–209).

The examiner held (N. R. 194) that these representations are not false or misleading. The Commission reversed on this issue (N. R. 209–210), stating in part: "Through such statements, respondent has represented, among other things, that the policies to which they refer provide indemnity up to a maximum sum of $300 for any operation serious enough to cost such an amount. Respondent's policies do not so provide" (N. R. 211).

[7] Under this category, the examiner found that National's "representations reasonably give the impression of indemnification in a specific amount for a definite period of time. 'From the first day for two years,' 'From the first day as long as totally disabled—even for life,' 'Accident income $—— per

With respect to the jurisdictional issue, the examiner held that the Commission had jurisdiction to proscribe deceptive and misleading representations made by National and disseminated directly by mail to prospective purchasers in the several states. He further held that the Commission had jurisdiction to stop National from transmitting such deceptive and misleading representations to its agents for local dissemination in the states of Mississippi, Rhode Island, Missouri, Montana, and the District of Columbia. However, on the basis of the McCarran-Ferguson Act, the examiner concluded that the Commission had no jurisdiction over similar acts and practices of National in the other states, each of which had enacted legislation prohibiting the use in the state of

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month,' etc., reasonably convey that impression" (N. R. 195–196).

He further found as follows: "Respondent's policies themselves, however, confer the indemnity promised only if the insured is wholly and continuously disabled by sickness and prevented thereby from performing any and every occupation or employment plus being under the personal attendance of a doctor. Obviously, there is much illness and disability which does not meet these requirements, especially during convalescence. Some of respondent's policies require continuous confinement to the house, before respondent will pay. Other exclusions are any indemnity for more than one month where loss is due to tuberculosis, hernia, paralysis, or mental derangement; no sickness which began before thirty days after policy issuance; disability arising more than 5, 20, or 30 days after the accident; maternity benefits only after policy has been in effect 10 months—in other words, respondent gets 10 months' premiums before it has to pay for loss of time for maternity" (N. R. 196).

unfair or deceptive acts or practices in the business of insurance (N. R. 201–202).[8]

The Commission decision. The Commission held that all the advertising representations set forth in the complaint were unfair and deceptive as charged (N. R. 208–210, 211). It further held, on the basis of its opinion in *American Hospital* (*infra*, pp. 16–19), that it had jurisdiction over the unfair and deceptive advertising practices of National in interstate commerce and that the mere enactment of state laws relating to such practices did not operate to divest it of jurisdiction (N. R. 205). The Commission accordingly entered an order requiring National, "in connection with the offering for sale, sale and distribution" in interstate commerce of accident and health insurance policies, to cease and desist from advertising the policies in the manner found by the Commission to be unfair and deceptive (N. R. 210–213). Two Commissioners dissented (N. R. 210, 213).

NO. 436

The facts. American is a Texas corporation with its principal place of business in that state. It is engaged in selling life, health, and accident insurance

[8] The examiner found that some 36 states had enacted the so-called "Model Bill" relating to insurance. And he found that, in addition to these 36 states, 8 others had statutes which, "while couched in different language or varying somewhat in detail, are essentially the same in effect as the 'Model Bill.' Of the remaining five [jurisdictions], one—Mississippi—has no 'regulation' of the insurance business at all, and remaining four have only statutes which patently refer only to life insurance companies, which this respondent is not" (N. R. 199–200).

and is licensed to sell such insurance in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. The challenged representations related only to its accident and health insurance business, from which it received premiums of $4,835,523.05 in 1953 and $5,009,184.47 in 1954 (A. R. 61–62).

American sells its accident and health insurance policies through agents in the various states where it is licensed to do business. For the purpose of selling insurance, American prepares and sends circulars or brochures, which contain the challenged representations, from Texas to its agents. These circulars or brochures are used by the agents and shown by them to prospective purchasers as aids in selling the policies to which they refer. Upon completion of an application for insurance, the advertising portions of the circular or brochure are left with the purchaser (A. R. 62–63).

When an agent in a state other than Texas secures an application for a policy, the agent sends the application through the mail with the premium payment to American in Texas. Upon acceptance of the application, the policy is issued and mailed by American to the agent in the other state for delivery to the purchaser (A. R. 62).[9]

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[9] In the substantial number of cases where purchasers of policies have moved from states where American is licensed to do business into states where it is not so licensed, American's practice is to mail premium notices and receipts to and to receive premium payments from the policyholder. Premium payments so received amounted to more than $47,300 in 1953 and more than $78,400 in 1954 (A. R. 62).

The examiner's decision. On the basis of the McCarran-Ferguson Act, the examiner concluded that the Commission had no jurisdiction with respect to allegedly false and deceptive acts and practices in commerce carried on by American except with persons living in Mississippi, the only state involved which at that time had not enacted legislation relating to deceptive insurance advertising (A. R. 37).[10] He further held that the charges of the complaint as to the false and misleading nature of the advertising had not been established (A. R. 37–58).

The Commission decision. The examiner's decision was reversed by the Commission, which held that all but one category of the advertising representations set forth in the complaint were unfair and deceptive as charged (A. R. 60–67).[11] The Commission found, as charged in the complaint (A. R. 5–10), that the cir-

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[10] He found that ten of the states in which respondent does business (Arizona, Arkansas, Colorado, Indiana, Kansas, Kentucky, Louisiana, New Mexico, Oklahoma, and Tennessee) had enacted statutes identical, or substantially identical, with the so-called "Model Unfair Trade Practices Bill for Insurance," which prohibits unfair methods of competition and unfair and deceptive acts and practices in the insurance business; that two of the other states in which respondent does business, Missouri and Illinois, had comparable statutes; that Mississippi did not; and that the statutes of Texas were immaterial since respondent's business within that state was intrastate (A. R. 33–37).

In the period between the examiner's decision and the Commission's decision, Mississippi enacted a regulatory statute (A. R. 107).

[11] The Commission dismissed the charge of the complaint that American had misrepresented that its policies might be continued indefinitely at the option of the insured (A. R. 63).

culars or brochures furnished by American and used by its agents in selling insurance contained misrepresentations as to the extent of coverage of the policies in the event of illness;[12] misrepresentations as to the extent of coverage of the policies in the event of accident;[13] misrepresentations as to the amounts that

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[12] Under this category, the Commission found that American advertised the following: "Confining: Illness: Indemnity: $—— Per Month. for loss of time from illness, beginning on the fourth day and continuing for one year for each illness (Up to two months full benefits for non-confining illness)" (A. R. 64, 82).

The Commission found that through this and similar statements American represents directly and by implication "that its policies provide indemnification for loss of time due to any and all sickness or illness." The Commission found that under some of American's policies indemnification is "expressly restricted" to sickness or disease "which wholly, necessarily and continuously disables and prevents the insured from engaging in any business, profession or employment for wage or profit and only for such period of time as the policyholder is regularly visited and attended by a legally qualified physician (M. D.), surgeon (M. D.) or osetopath * * *." The Commission also found that American's policies do not cover "illness due to pregnancy, miscarriage or childbirth in case of a woman policyholder * * *." The Commission held, therefore, that American's representations as to the indemnification provided by its policies for loss of time due to sickness or illness are "false and deceptive" (A. R. 64; see also A. R. 82–86).

[13] Under this category, the Commission found that American advertised the following: "Total Accident Disability: $—— Per Month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled," and "Partial Accident Disability: $—— Per Month for loss of time from accidental injury, beginning with the first day and continuing for the period of partial disability (limit 3 months)" (A. R. 64–65, 83).

The Commission found that through these and similar statements American represents directly and by implication "that

would be paid for surgical operations;[14] and misrepresentations that maternity benefits would be paid in addition to the other benefits payable under the poli-

its policies provide indemnification for loss of time due to all or any accidents." The Commission found that under some of American's policies its liability due to total accident disability "is limited to accidents that shall within twenty days after the date of the accident wholly, necessarily and continuously disable and prevent the insured from performing each and every duty pertaining to his occupation for the first twelve months," and that after the first twelve months, in order to collect, the insured must be "wholly and continuously disabled" from engaging in any occupation for wage or profit. The Commission found that the policies expressly limit American's liability for loss of time due either to total or partial accident disability to such periods as the insured is under the regular care of a physician, surgeon or osteopath. The Commission held, therefore, that American's representations in this respect are "false and deceptive" (A. R. 65; see also 83–86).

[14] Under this category, the Commission found that American advertised one of its policies as follows: "Surgery from $3.00 to $150.00 * * * depending on seriousness of operation" (A. R. 66, 86).

The Commission found that through such statements American represents that the policy "provides indemnity up to a maximum sum of $150 for any operation serious enough to cost such an amount * * *," and that the policy does not so provide. Under the policy, the Commission found, payment "is in accordance with a schedule of fixed fees for different types of operations." Only six out of 67 operations listed allow for a surgeon's fee of $150, and 29 operations allow for surgeon's fees of $25 or less, "regardless of the actual cost of such operations to the policyholder." The Commission held that American's representations in this respect are "false and deceptive" (A. R. 66; see also A. R. 86).

cies.[15] The Commission further held that it had jurisdiction over the unfair and deceptive advertising practices of American in interstate commerce, irrespective of whether the states involved had adopted local laws relating to such practices (A. R. 68–82), and entered an order prohibiting further use of the practices found to be unlawful (A. R. 67–68).

On the question of its jurisdiction, the Commission recognized that the McCarran-Ferguson Act was enacted for the purpose of allowing the states to continue to regulate the business of insurance, thus dispelling doubts raised by *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. But the Commission did not read the Act, especially in the light of the circumstances that led to its passage, as a complete abdication of all federal regulation of the interstate aspects of the business of insurance (A. R. 69–73). Such activities, the Commission held, could not be "regulated by State law" and hence remained subject to its jurisdiction by virtue of the McCarran-

[15] Under this category, the Commission found that, following a listing of the benefits payable under one of American's policies for room service, hospital expense, and surgery, American advertised the following: "Additional Benefits * * * Maternity: Up to $—— after * * * insurance has been in force 10 months * * *" (A. R. 65–66, 86–87).

The Commission found that the policy expressly provides that payment of maternity benefits shall be "in lieu of all other benefits provided in the policy for hospital services." The Commission held that "it is, thus, clear that the maternity benefit, instead of being an additional benefit, as represented is merely a substitute," and that American's representations to the contrary are "false and deceptive" (A. R. 66; see also A. R. 86–87).

Ferguson Act proviso "[t]hat after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law" (A. R. 74).

In the Commission's view (A. R. 79), there is "an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation 'to the extent that such business is not regulated by State law' is inoperative." Though state regulation is authorized by the McCarran-Ferguson Act and may "hav[e] consequences in other jurisdictions" (A. R. 79), the Act, the Commission held, was not intended to create a "legal vacuum" and thus enable insurance companies to escape adequate regulation where there is no conflict between state and federal laws (A. R. 75).

Implicit in the view of the hearing examiner, the Commission stated (A. R. 70–71), "is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. * * * We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation, admits of such a construction. * * *"

The Commission further stated (A. R. 75, 76, 80):

> The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only

consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the State in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

* * * * *

* * * Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

* * * * *

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress decep-

> tion in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. * * *

The Commission thus concluded that the mere enactment of a state law relating to advertising practices of insurance companies did not operate to oust it of jurisdiction.

THE DECISIONS OF THE COURTS OF APPEALS

On American's petition to review, the Fifth Circuit set aside the Commission's order. It held that the Commission under the McCarran-Ferguson Act was without jurisdiction because of the enactment of state laws forbidding the use of unfair and deceptive acts and practices in the states where American transacts business (A. R. 110–117). The court stated that it had no doubt that a state has the power "adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries" (A. R. 116).

Similarly, on National's petition to review, the Sixth Circuit set aside the Commission's order and remanded the case to the Commission for further proceedings consistent with its opinion (N. R. 216–225). In rejecting the Commission's conclusion on the jurisdictional issue, the court recognized "some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, out-

side the jurisdiction of the states, which should be subject to federal regulation" (N. R. 222). The court, however, denied "that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be" (N. R. 222). The court held that the Commission was without jurisdiction in those states which had enacted legislation relating to insurance advertising (N. R. 225).

SUMMARY OF ARGUMENT

The two courts below held that Congress by the McCarran-Ferguson Act conferred upon the states the power, by the mere enactment of state laws seeking the accomplishment of the exact purpose of the Federal Trade Commission Act, to divest the Commission of jurisdiction over the interstate sale of insurance by false and misleading advertising. We think these decisions misconstrue the McCarran-Ferguson Act.

In *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, this Court held that the business of insurance conducted across state lines is interstate commerce and is subject to the prohibitions of the Sherman Act. Prior to that decision, many states had considered rate-fixing on insurance to be in the public interest, and had enacted regulatory laws authorizing and supervising the fixing of such rates. Also, many states had laws imposing taxes on out-of-state insurance companies in a manner which may have burdened or discriminated against interstate commerce in insurance.

In a successful effort to offset the effect of the *South-Eastern Underwriters* decision, Congress

enacted the McCarran-Ferguson Act, declaring in Section 1 "that the continued regulation and taxation by the several States of the business of insurance is in the public interest * * *." To give the insurance companies a breathing spell and the states an opportunity to declare their own policies as to the regulation of insurance, Congress provided in Section 3 (a) of the Act a three-year moratorium on the application to that business of the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act. But Congress also specified, in Section 2 (b) of the McCarran-Ferguson Act, that, after the expiration of the moratorium the Sherman, Clayton, and Federal Trade Commission Acts *"shall be applicable to the business of insurance to the extent that such business is not regulated by State law"* (emphasis added). It is the latter provision which is principally in issue here.

Under the construction of this provision by the courts below, the Federal Trade Commission is denied effective jurisdiction to prevent the use of false and misleading advertising in connection with the interstate sale of insurance. The holdings would limit the Commission's jurisdiction, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising. According to these decisions, Commission jurisdiction is automatically extinguished upon the mere enactment of such legislation—extinguished without regard to the fact that the transactions may, as a practical matter, be beyond the scope of effective state regulation; without regard to the fact that false advertising

is condemned by the state legislation, not sanctioned by it; and without regard to the fact that the federal action would not conflict with state action in any way. A more discriminating approach, we believe, is required by the language and history of the Act.

A

At the outset, it is of fundamental importance to understand how relatively narrow is the question presented. The Commission, it should be emphasized, is not attempting to apply a federal statute which conflicts with state legislation. There is no contention here that a federal statute supersedes or invalidates state legislation in any way. Nor is the Commission proceeding against insurance advertising which has been approved, formally or informally, by state authorities. Nor are we concerned here with local or intrastate transactions. Instead, all that the Commission contends is that Congress has not divested it of authority under the Federal Trade Commission Act to police the channels of interstate commerce, in conjunction and cooperation with the states, in order to provide full protection to the public from deception in this important area.

Indeed, not only is there no conflict, but actually the standards of the Federal Trade Commission Act and the state statutes are identical. Each prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." And no one has even intimated that any of the states actually had applied its regulatory statute to the advertising practices of the two companies involved here.

Thus, the issue before the Court is not whether the Federal Trade Commission Act can be applied so as to override state policy specifically expressed either in statutes or administrative action. Congress, we think, has resolved that issue in the negative. The issue here is quite different—namely, whether the Federal Trade Commission Act can be applied to false interstate insurance advertising in the absence of such a conflict. Compare *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (especially concurring opinion of Mr. Justice Frankfurter at pp. 300–302), involving the scope of federal authority over liquor under the Twenty-First Amendment.

B

As this Court noted in *South-Eastern Underwriters* (322 U. S. at 552): "The power granted Congress [by the Commerce Clause] * * * is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—*to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing*" (emphasis added). This inherent incapacity of "the individual states, with their limited territorial jurisdictions," was left unchanged by the McCarran-Ferguson Act, which indisputably did not add to the jurisdiction possessed by the states prior to the *South-Eastern Underwriters* decision. The result, in the absence of federal regulation to fill the void, is a legal vacuum—a "no man's land" which is not effectively regulated either by the states or by the federal government.

To conclude that Congress intended such a divestiture of federal jurisdiction would require, we believe, far more explicit language than is contained in the proviso to Section 2 (b). Particularly is this so in view of the express purpose of the drafters "to secure adequate regulation and control" of the insurance business. S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2. This purpose obviously cannot be reconciled with the existence of the "no man's land" which the Sixth Circuit apparently concedes would result from its construction of the Act.

At the very least, therefore, we think that the Act, in providing that the Federal Trade Commission Act shall apply "to the extent that such business is not regulated by State law," must be taken to mean that the Federal Trade Commission Act shall apply to the extent that the business, in its interstate aspects, cannot be effectively regulated by state law. Stated otherwise, to the extent that the business cannot be effectively regulated by state law, then surely to that extent the "business is not regulated by State law." To hold that the mere placing on the statute books of a state enactment forbidding "unfair methods of competition" and "unfair or deceptive acts or practices" completely ousts the Commission of jurisdiction, even though the state statute is little more than hortatory in its effect on the interstate aspects of the dissemination of false insurance advertising, would be to impute to Congress a willingness to be satisfied by state "regulation" which exists only on paper.

C

The basic distinction is between (1) state insurance laws sanctioning what federal law forbids and (2) state insurance laws prohibiting what federal law also forbids. We believe that the courts below, in holding that the mere enactment of state insurance laws relating to false advertising precludes Commission jurisdiction, erred in failing to draw this distinction.

The mere enactment of specific state insurance laws in the first category may be sufficient to render certain federal laws inapplicable; for, in that event, there is an obvious collision between federal and state policy and Congress has decreed that state policy should be controlling. But as to the second category, there is no such conflict. Until the state authorities act to apply this common policy to the same transaction, there would seem to be no substantial reason why the federal and state governments should not both have jurisdiction.

To hold that the mere enactment of state laws in the second of the two categories ousts the Commission of jurisdiction is to distort and defeat the purpose of the McCarran-Ferguson Act. As this Court recognized in *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, 429–430, the purpose of the Act "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation"

and by affirmatively declaring the business of insurance to be subject to state regulation and taxation. This purpose is completely consistent with, and effectuated by, the Commission's action in undertaking to stop false and misleading advertising in the interstate sale of insurance. Such action does not in any way interfere with the execution of state insurance policies, but instead serves to supplement the limited power of the states in carrying out those policies.

In providing that the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law," Congress was dealing, we think, with matters of substance and not form, and was referring to "regulation" in fact—*i. e.*, state action which actually takes hold of the conduct involved. Where, for example, a state law authorizes the maintenance of rate-fixing bureaus and no implementing administrative action is needed, the transaction is "regulated by State law" in a very concrete sense; the statute is self-executing and the regulatory action is implicit in the statute itself. But where a statute, instead of sanctioning a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no "regulation" in fact.

This is especially true where the prohibitory legislation is as general in scope as the state statutes involved here. Unless and until the administrative

process of "filling in and administering the details embodied by [the] general standard" (*Humphrey's Executor* v. *United States*, 295 U. S. 602, 628) is consummated in individual cases, to that extent the "business is not regulated by State law."

D

Apart from stating the purpose "to secure adequate regulation and control of the insurance business", the House and Senate reports on the bill contain nothing dealing directly with the question presented here. As already shown, "adequate regulation" cannot be accomplished under the construction adopted by the courts below, which, even though there is no conflict between the purpose of state laws and that of the Federal Trade Commission Act, leaves the advertising practices of insurance companies beyond the scope of effective regulation where such companies operate on a nation-wide or multi-state basis.

The floor debates on the McCarran-Ferguson bill also furnish substantial support for the Commission's construction of the Act. Senator McCarran's statements are fully consistent with the Government's position. Senator Ferguson, a co-sponsor of the Act, indicated that it was only in cases of conflict that state enactments would serve to divest the Commission of interstate jurisdiction over the business of insurance; indeed, Senator Ferguson even disclaimed any intention to let the states regulate interstate commerce at all. Senator O'Mahoney, one of the Senate

managers of the bill and as such a co-author of the proviso to Section 2 (b), assured the Senate that, after the expiration of the moratorium, the Federal Trade Commission Act would again become fully applicable to the business of insurance. And members of the House expressed their desire that the application of the Federal Trade Commission Act to false advertising by insurance companies be preserved.

ARGUMENT

THE McCARRAN-FERGUSON ACT DOES NOT DIVEST THE COMMISSION OF JURISDICTION OVER FALSE AND MISLEADING ADVERTISING IN CONNECTION WITH THE INTERSTATE SALE OF INSURANCE UPON THE MERE ENACTMENT OF STATE LAWS PROHIBITING SUCH PRACTICES WITHIN THE BOUNDARIES OF THE STATES INVOLVED

These cases are concerned with the business of insurance—a business viewed by this Court as "one of the largest and most important branches of commerce," one which "touches the home, the family, and the occupation or business of almost every person in the United States." *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, 540.

More specifically, the cases involve advertising practices in connection with sales of accident and health insurance in interstate commerce.[16] Total acci-

[16] "Accident and health" insurance, sometimes called "accident and sickness" insurance, is a disability coverage providing indemnification against loss resulting from accidental injury or sickness. This indemnification is in the form of benefits payable for hospitalization, medical and surgical expenses, and loss of income during periods of disability.

dent and health premium payments in the United States during the year 1956 amounted to more than 4.96 billion dollars.[17] The spectacular increase in sales of this type of insurance in recent years probably finds no parallel in our economy. An industry publication[18] recently stated that between 1940 and the end of 1956 the number of persons in this country with hospital expense protection increased from 12,312,000 to 115,949,000 (an increase of more than 840%); the number with surgical expense protection increased during the period from 5,350,000 to 101,325,000 (an increase of more than 1,790%); and the number with regular medical expense protection increased during the period from 3,000,000 to 64,891,000 (an increase of more than 2,000%). Thus, of an estimated 170,000,000 population of the United States at the end of 1956, more than 68% carried hospital insurance, more than 59% carried surgical insurance, and more than 38% carried medical insurance.

Taking note of widespread evidence that the phenomenal growth of the accident and health insurance business has been accompanied in many instances by false and misleading advertising, and cognizant of the important public interest in protecting the people

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[17] *The National Underwriter*, No. 18, p. 1 (May 3, 1957).

[18] *The Extent of Voluntary Health Insurance Coverage in the United States as of December 31, 1956*, published by The Health Insurance Council (Aug. 1957), p. 10. The Health Insurance Council is composed of eight associations representing insurance companies selling accident and health insurance. The companies represented sell more than 90% of this type of insurance sold by United States insurance companies. (Inside front cover of publication.)

of the United States from advertising of this nature, the Commission has undertaken an active program under Section 5 of the Federal Trade Commission Act to eliminate such practices from the channels of interstate commerce. In all, the Commission since October 1954 has issued 41 complaints in this field. In 13 of the cases, the Commission has issued orders to cease and desist; one of the complaints was dismissed for failure of proof of the false advertising practices charged; hearing examiners have issued initial decisions containing orders in 15 cases which have not yet been acted upon by the Commission; hearing examiners have issued initial decisions containing orders dismissing the Commission's complaint in four cases which have not yet been acted upon by the Commission; and eight of the cases have not yet been acted upon by examiners. These 41 cases comprise virtually every possible method of advertising and selling accident and health insurance in interstate commerce, including the local agent method, the use of the United States mails, and the use of radio, television, newspapers, and other periodicals.[19]

[19] In addition to the two instant cases, four other Commission cease and desist orders against accident and health insurance companies are pending for review in Courts of Appeals: *Travelers Health Association* v. *Federal Trade Commission* (Commission Docket No. 6252; C. A. 8, No. 15,743), argued orally on November 13, 1957; *American Life and Accident Insurance Company* v. *Federal Trade Commission* (Commission Docket No. 6238; C. A. 8, No. 15,828), scheduled for oral argument on March 5, 1958; *Automobile Owners Safety Insurance Company* v. *Federal Trade Commission* (Commission Docket No. 6239; C. A. 8, No. 15,830), scheduled for oral argument on March 5, 1958; *North American Accident Insurance Company*

However, under the decisions of the courts below, the Commission is denied effective jurisdiction in this field. The effect of these decisions is to limit the Commission's jurisdiction, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising. According to the two decisions, Commission jurisdiction is automatically extinguished upon the mere enactment of such legislation—extinguished without regard to the fact that the transactions may, as a practical matter, be beyond the scope of effective state regulation; without regard to the fact that false advertising is condemned by the state regulation, not sanctioned by

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v. *Federal Trade Commission* (Commission Docket No. 6456; C. A. 5, No. 16633), time for filing record extended until disposition by this Court of the instant cases. The Commission's decisions in these cases have not yet been officially reported. The Commission found that the methods of transacting business of the four companies are as follows: Travelers Health Association does a mail-order insurance business in all states, is licensed only in Nebraska (its home state) and Virginia, employs no local agents, and advertises its policies only by direct mail from Nebraska to prospects for insurance. American Life and Accident Insurance Company transacts a mail-order insurance business in all states, is licensed only in Missouri (its home state), employs no local agents and advertises its policies by radio from Missouri, Illinois, and Kansas and by direct mail from Missouri to prospects. Automobile Owners Safety Insurance Company transacts a mail-order insurance business in all states except Virginia, is licensed only in Missouri (its home state), and advertises its policies only by direct mail from Illinois to prospects. North American Accident Insurance Company transacts business in all states, is licensed and employs local agents in all states, and advertises its policies by radio, newspapers, and other periodicals, and by direct mail from Illinois (its home state) to prospects.

it; and without regard to the fact that the federal action would not conflict with state action in any way.

These holdings, we submit, misinterpret the scope of the McCarran-Ferguson Act on which they rely. The McCarran-Ferguson Act resulted from this Court's 1944 decision in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, that the business of insurance conducted across state lines is interstate commerce and that the prohibitions of the Sherman Act apply to that business. Prior to that decision, the Court had held that the business of insurance was not commerce, either intrastate or interstate.[20] The states, as the opinions in *South-Eastern Underwriters* recognized, had built up separate systems of laws specifically dealing with the business of insurance conducted within their boundaries. The constitutionality of this entire structure under the Commerce Clause was placed in doubt by the *South-Eastern Underwriters* decision. The industry feared the invalidation of state laws authorizing certain anticompetitive practices such as the maintenance of rating bureaus and, indeed, feared the possibility of total federal regulation. The states, on their part, feared the loss of large revenues through the invalidation of their insurance tax laws. To dispel these fears, and "to secure adequate regulation and control of the insurance business" (S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p.

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[20] *E. g.*, *Paul* v. *Virginia*, 8 Wall. 168, 183; *Hooper* v. *California*, 155 U. S. 648, 654–655; *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 503–504, 510.

2), the McCarran-Ferguson Act was enacted. See *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408.

The Act provides in Section 1 "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Section 2 (a) provides that "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Section 2 (b) is as follows:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided, That after June 30, 1948, * * * the Sherman Act, * * * the Clayton Act, and * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.* [Emphasis added.]

Section 3 (a) established a moratorium until June 30, 1948, as to the application of the three acts named in Section 2 (b) to the business of insurance. Section 3 (b) provides that nothing in the Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate or to any act of

boycott, coercion, or intimidation.[21] And Section 4 provides that the Act shall not be construed to affect in any manner the application to the business of insurance of the National Labor Relations Act, the Fair Labor Standards Act, and the 1920 Merchant Marine Act.[22]

The critical language here is the italicized proviso (*supra*) to Section 2 (b), which affirmatively continues Commission jurisdiction "to the extent that such business is not regulated by State law." Under the circumstances of these cases, the Commission held that this proviso did not operate to divest the Commission of jurisdiction under the Federal Trade Commission Act to prevent the interstate sale of insurance by means of false advertising—in short, that such practices by National and American are "not regulated by State law" merely because of the enactment of general state legislation on the subject.

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[21] In *United States v. New Orleans Insurance Exchange*, 148 F. Supp. 915, 922 (E. D. La.), affirmed *per curiam* 355 U. S. 22, the District Court said that "The legislative history of Section 3 (b) [of the McCarran-Ferguson Act] affirms what its language so plainly says," and held that the Sherman Act was applicable to a group boycott by an association of insurance agencies and its members.

[22] We believe that the Sixth Circuit erred in stating concerning this section (N. R. 222): "If it was intended by the Act to retain in or give to the agencies of the Federal Government jurisdiction over insurance companies engaged in interstate commerce, irrespective of its regulation by state law, this section of the Act [Section 4] was unnecessary and meaningless since the acts referred to would be applicable by reason of the Supreme Court's decision [in the *South-Eastern Underwriters* case] without the provisions of Section 4." But it is clear that if Section 4 had been omitted, the three Acts mentioned therein would have been subject to (and not exempt from) the over-all impact of the McCarran-Ferguson Act.

In urging the correctness of this construction, we shall show, *first,* that no conflict—either statutory or administrative—exists between the Commission's action and any state law; *second,* that a contrary construction would create a regulatory "no-man's land" which Congress could not have intended; *third,* that the purpose of the McCarran-Ferguson Act was to remove federal impediments to the execution of state policies, and not to bar federal action wholly consistent with such state policies; *fourth,* that the legislative history of the McCarran-Ferguson Act confirms this construction.

A. IN THESE CASES, THERE IS NO CONFLICT, EITHER IN THE STATUTES THEMSELVES OR IN THEIR ADMINISTRATION, BETWEEN THE FEDERAL TRADE COMMISSION ACT AND STATE LAWS RELATING TO FALSE AND MISLEADING ADVERTISING OF INSURANCE

At the outset, it is of fundamental importance to understand how relatively narrow is the question presented. The Commission, it should be emphasized, is not attempting to apply a federal statute which conflicts with state legislation. There is no contention here that a federal statute supersedes or invalidates state legislation in any way. Nor is the Commission proceeding against insurance advertising which has been approved, formally or informally, by state authorities. Nor are we concerned here with local or intrastate transactions. Instead, all that the Commission contends is that Congress has not divested it of authority under the Federal Trade Commission Act to police the channels of *interstate* commerce, in conjunction and cooperation with the states, in order to

provide full protection to the public from deception in this important area. Such federal authority serves to fill the jurisdictional void which the Sixth Circuit apparently concedes would exist under its decision (see *infra*, p. 43).

Not only is there no conflict, but indeed the standards of the Federal Trade Commission Act and the state statutes are identical. Each prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."[23] And though a number of states have appeared in the courts below as *amici curiae* urging the inapplicability of the Federal Trade Commission Act in these cases, not one has even intimated that it actually had applied its regulatory statute to the practices of the two companies involved here. Plainly, if the states had the capacity, and had exercised it, to prevent the interstate sale of insurance by means of false advertising, the Commission would have had no occasion to proceed in these cases.[24]

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[23] At the present time, 41 states, Alaska, and Hawaii have enacted the "Model Unfair Trade Practices Bill for Insurance," or a statute substantially similar thereto, prohibiting in the language of the Federal Trade Commission Act "unfair methods of competition" and "unfair or deceptive acts or practices" in the business of insurance generally. The Kansas statute, typical of these state laws, is printed in an appendix, *infra*, pp. 67–80. In addition, California, Idaho, Illinois, Montana, Oregon, Rhode Island, and Puerto Rico have somewhat similar statutes relating to unfair trade practices in the business of insurance generally. The remaining state, Missouri, and the District of Columbia have similar statutes relating only to life insurance companies.

[24] While it was unnecessary to its decision, since there is no conflict here, the Commission's opinion states, *inter alia*, that Congress must have "contemplated that under certain condi-

These cases, in short, are precisely the opposite of a case such as *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange,* 181 F. 2d 174 (C. A. 8), certiorari denied, 340 U. S. 823. In that case, involving a treble damage suit alleging violations of the Sherman Act, an Arkansas statute authorized the fixing through rating bureaus of rates on casualty insurance sold within the state. The court held (*id.* at 176) that, although the activities of the rating bureaus may have been in violation of the Sherman Act prior to the enactment of the McCarran-Ferguson Act, the latter act was designed "to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce." Therefore, since the Arkansas statute specifically sanctioned the very practice in question and hence conflicted with the prohibitions of the Sherman Act, the federal act did not apply.[25]

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tions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof" (A. R. 75). The Commission has never so applied the Act and the quoted statement, we believe, amounts only to *obiter dicta.*

Indeed, under the Commission's construction of the McCarran-Ferguson Act, it is most unlikely that a conflict would ever arise as to insurance advertising. Surely it is inconceivable that any state would enact a statute affirmatively sanctioning false advertising. Nor does a conflict seem possible in the administration of the state laws prohibiting false insurance advertising. See note 32, *infra.*

[25] Cf. *Miley* v. *John Hancock Mutual Life Insurance Company,* 148 F. Supp. 299 (D. Mass.), affirmed *per curiam,* 242 F. 2d 758 (C. A. 1), certiorari denied, 355 U. S. 828. That case involved a suit for treble damages because of an alleged

But here the state statutes and the federal act are entirely consistent and complementary. False advertising of insurance is opposed to the public interest, as the Congress and the states have both declared. And the power of Congress to remove Commerce Clause restrictions upon state legislation, and to join with the states in effecting a common policy and purpose, frequently has been upheld by this Court.[24] These decisions uniformly "have sustained coordinated action taken by Congress and the states in the regulation of commerce." *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. at 433. In the latter case, dealing with another aspect of the McCarran-Ferguson Act, the Court pointed out (*id.* at 439) that federal and state agencies "were not forbidden to cooperate or by doing so to achieve legislative consequences, particu-

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conspiracy in restraint of trade under the Sherman Act. The District Court held (148 F. Supp. at 302): "Assuming that what was done here by the defendants would under other circumstances constitute a conspiracy or combination violative of the Sherman Act, it was nevertheless done in the course of negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided [in the proviso to Section 2 (b) of the McCarran-Ferguson Act] that the Sherman Act shall not apply." This is another instance where a state law which conflicted with the Sherman Act was held to control.

[24] *In re Rahrer*, 140 U. S. 545, 559–565; *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311, 320–325; *Whitfield* v. *Ohio*, 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769; *International Shoe Co.* v. *Washington*, 326 U. S. 310, 315; *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 433, and cases cited in n. 43 at 433.

larly in the great fields of regulating commerce and taxation; which, to some extent at least, neither could accomplish in isolated exertion."

Thus, the issue before the Court is not whether the Federal Trade Commission Act can be applied so as to override state policy specifically expressed either in statutes or administrative action. Congress, we think, has resolved that issue in the negative. The issue here is quite different—namely, whether the Federal Trade Commission Act can be applied to false interstate insurance advertising in the absence of such a conflict.

In this respect, the problem of determining the effect of the McCarran-Ferguson Act on federal authority over insurance is remarkably similar to the problem of determining the effect of the Twenty-first Amendment on federal authority over liquor. This Court has regularly held that "The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquor brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138.[27] But the Twenty-first Amendment has never been construed as an abdication of federal jurisdiction under the Sherman Act to prevent combinations in restraint of interstate trade where there is no conflict with the policy of state law.

In *United States* v. *Frankfort Distilleries, Inc.*, 324

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[27] See also *State Board* v. *Young's Market Co.*, 299 U. S. 59, 62; *Mahoney* v. *Triner Corp.*, 304 U. S. 401, 403–404; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394; *Finch & Co.* v. *McKittrick*, 305 U. S. 395, 398; *Carter* v. *Virginia*, 321 U. S. 131, 137, and see concurring opinions of Mr. Justice Black at 138 and Mr. Justice Frankfurter at 139.

U. S. 293, several producers, wholesalers, and retailers of liquor were indicted for engaging in a conspiracy to fix and maintain retail resale prices in violation of the Sherman Act. The defense was that under Colorado's "Fair Trade" statute vertical agreements to fix minimum resale prices were lawful, and that the Twenty-first Amendment barred the prosecution. In holding that the Sherman Act applied to the conspiracy, the Court emphasized the absence of any conflict between the policy of the Sherman Act and the Colorado statute. The Court stated (*id.* at 299):

> The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either. We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented.

In a concurring opinion, Mr. Justice Frankfurter stated that the Twenty-first Amendment empowered the states to regulate liquor "according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce * * *" (*id.* at 300), and that accordingly, "if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power "(*id.* at

302). But he joined in the Court's decision because of the lack of any "contention that the policy of Colorado sanctions that which it is claimed the Sherman Law forbids" (*ibid.*).

So, here, the McCarran-Ferguson Act empowers the states to regulate insurance "according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce * * *". But here, as in *Frankfort Distilleries,* there is no basis for any "contention that the policy of [a state] sanctions that which it is claimed the [federal law] forbids". As stated in the Court's opinion in *Frankfort Distilleries,* "We therefore do not have here a case in which the [federal law] is applied to defeat the policy of the state".

In these circumstances, as we shall show below, the McCarran-Ferguson Act does not bar application of the Federal Trade Commission Act.

B. THE COMMISSION'S CONSTRUCTION OF THE ACT AVOIDS, WITH RESPECT TO FALSE INSURANCE ADVERTISING IN INTERSTATE COMMERCE, A REGULATORY "NO MAN'S LAND" WHICH CONGRESS COULD NOT HAVE INTENDED

As this Court noted in *South-Eastern Underwriters* (322 U. S. at 552): "The power granted Congress [by the Commerce Clause] * * * is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—*to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.*" (Emphasis added.) See

also *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429–430. This incapacity of "the individual states, with their limited territorial jurisdictions," was left unchanged by the McCarran-Ferguson Act, which indisputably did not add to the jurisdiction possessed by the states prior to the *South-Eastern Underwriters* decision.

"Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in [*South-Eastern Underwriters*] might be found to have on State regulation of insurance." *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413. Thus, the House report accompanying the legislation flatly stated: "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." H. Rep. No. 143, 79th Cong., 1st Sess., p. 3. See also 91 Cong. Rec. 1442 (statement of Senator McCarran).

To the extent, therefore, that "the individual states, with their limited territorial jurisdictions [were] not fully capable of governing" insurance "transactions which, reaching across state boundaries, affect the people of more states than one," that condition necessarily continued after enactment of the McCarran-Ferguson Act. The result, in the absence of federal

regulation to fill the void, is a legal vacuum—a "no man's land" which is not effectively regulated either by the states or by the federal government.

This was recognized by the Sixth Circuit, which acknowledged that "There is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation" (N. R. 222). That court, however, denied "that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be" (N. R. 222). Under the court's construction of the proviso to Section 2 (b), the Commission's jurisdiction in the field is limited, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising.

In so holding, the court treated the proviso to Section 2 (b) as "the only express grant of power to the Federal Trade Commission over the business of insurance contained in the Act" (N. R. 221). But the Commission's jurisdiction over interstate commerce (including the interstate sale of insurance) is derived from its organic statute, the Federal Trade Commission Act. The question, therefore, is not whether the McCarran-Ferguson Act confers on the Commission jurisdiction over the interstate business of insurance, but whether that Act *divests* the Commission of the jurisdiction over the multi-state activities of insurance companies which it would otherwise have by virtue of

the Federal Trade Commission Act and the *South-Eastern Underwriters* decision.

To conclude that Congress intended such a divestiture would require, we believe, far more explicit language than is contained in the proviso to Section 2 (b). This Court has admonished that exceptions to the antitrust laws (including the Federal Trade Commission Act) are to be strictly construed. See, *e. g., United States* v. *McKesson & Robbins,* 351 U. S. 305, 316. But, more important, Congress should not be presumed by its silence to have deliberately established a regulatory "no man's land" with respect to protection of the public from false and misleading insurance advertising. Particularly is this so in view of the express purpose of the drafters "to secure adequate regulation and control" of the insurance business. S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2. This purpose obviously cannot be reconciled with the existence of the "no man's land" which the court below apparently concedes would result from its construction of the Act.

At the very least, therefore, we think that the Act, in providing that the Federal Trade Commission Act shall apply "to the extent that such business is not regulated by State law", must be taken to mean that the Federal Trade Commission Act shall apply to the extent that the business, in its interstate aspects, cannot effectively be regulated by state law. Stated otherwise, to the extent that the business cannot effectively be regulated by state law, then surely to that extent

the "business is not regulated by State law." To hold that the mere placing on the statute books of a state enactment forbidding "unfair methods of competition" and "unfair or deceptive acts or practices" completely ousts the Commission of jurisdiction, even though the state statute is little more than hortatory in its effect on the interstate aspects of the dissemination of false insurance advertising, would be to impute to Congress a willingness to be satisfied by "regulation" which exists only on paper.

The *National* case illustrates the difficulties of protecting the public if such a construction were adopted by this Court. National disseminates, by mail and other means, advertising material to prospective customers located in all 48 states (as well as the District of Columbia and Hawaii), either directly or through various agents of the company. The problem presented is thus nationwide in its impact, but the states, acting individually, can not adequately cope with this problem. State insurance laws generally do not even purport to regulate the business of insurance beyond the borders of the state (*e. g.*, Insurance Code of Michigan, 1956, c. 20, Sections 24.12001–24.12050; 1955 Supplement to General Statutes of Kansas, Sections 40–2401—40–2414).[28] And,

[28] The Kansas statute, typical of those of the 41 states which have enacted the so-called "Model Unfair Trade Practices bill for Insurance," is reproduced as an appendix, *infra*, pp. 67–80. It provides in Section 40–2401 that the purpose of the Act is to regulate trade practices "by defining, or providing for the determination of, all such practices *in this state* which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so de-

even assuming that these laws did purport to do so, it seems clear that citizens of the other 47 states would not thereby receive adequate protection.

For example, as Congress recognized in enacting the McCarran-Ferguson Act, the Fourteenth Amendment imposes substantial limitations on the power of the states to regulate out-of-state transactions. See, *e. g., Allgeyer* v. *Louisiana,* 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346; *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77; *New York Life Ins. Co.* v. *Head,* 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426. Cf. *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 416. These limitations have not been eliminated as a result of later decisions of this Court. See, *e. g., Osborn* v. *Ozlin,* 310 U. S. 53, 62; *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313. The *Allgeyer, St. Louis Compress,* and *Johnson* cases (*supra*) were cited in the House Report (H. Rep. No. 143, 79th Cong., 1st Sess., p. 3) and by Senator McCarran on the Senate floor (91 Cong. Rec. 1442) as among the "controlling decisions of the United States Supreme Court" setting out the constitutional limitations to which the Act was subject.

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fined or determined." [Emphasis added.] Section 40-2403 provides:

> No person shall engage *in this state* in any trade practice which is defined in this act as, or determined pursuant to this act to be, an unfair method of competition, or an unfair or deceptive act or practice in the business of insurance. [Emphasis added.]

In addition, wholly apart from constitutional limitations, the authorities of the state of origin can hardly be expected to devote their necessarily limited financial and manpower resources to the investigation and prosecution of misrepresentations made to the citizens of the other 47 states. "And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643, 649, citing *Lumbermen's Ins. Co.* v. *Meyer,* 197 U. S. 407, 418–419, and *Mutual Life Ins. Co.* v. *Spratley,* 172 U. S. 602, 619. On the other hand, any attempt by one of the other 47 states to deal inside its boundaries with advertising originating elsewhere would fail to get at the source of the evil; it would deal only with a symptom rather than the cause.

The problem is even more acute where an insurance company employs no local agents and has no office or assets within the state. In those circumstances, there would seem to be no way in which the state can adequately protect its citizens from false advertising disseminated from out-of-state points through the media of the United States mails (as in the instant case), newspapers, magazines, radio, or television.[29] Yet, under the decisions below, the Com-

[29] Compare *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643. There this Court, in connection with an insurer located in Nebraska and engaged in the mail-order health insurance business, held that Virginia "has power to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants

mission is precluded from acting even in that situation, so long as the states involved have enacted legislation relating to insurance advertising.[30] The result, it seems clear, is certainly not the "adequate regulation and control" of the insurance business

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on the Secretary of the Commonwealth." *Id.* at 647. In so holding, the Court placed emphasis on "the unpaid activities of those already members, who are encouraged to recommend the Association to friends and submit their names to the home office." *Id.* at 646, 648. See also the concurring opinion of Mr. Justice Douglas, *id.* at 653–654: "A state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesmen, or solicitors to obtain business for it within the state. Then it is beyond the reach of process. In the present case, however, that is only the formal arrangement. The actual arrangement shows a method of soliciting business within Virginia as active, continuous, and methodical as it would be if regular agents or solicitors were employed."

It should also be noted that the Court recognized that problems might arise as to the "methods by which the state might attempt to enforce [its order]" (*id.* at 651), but found it unnecessary to discuss those problems.

[30] Although the Commission was divided three-to-two as to its jurisdiction in the two cases here, it has unanimously upheld its jurisdiction in other cases involving insurance companies doing business primarily on a mail-order basis. See, *e. g.*, *American Life and Accident* case, *supra*, note 19. Compare *United States* v. *Sylvanus*, 192 F. 2d 96 (C. A. 7), certiorari denied, 342 U. S. 943. There it was held that, irrespective of the McCarran-Ferguson Act, the federal mail-fraud statutes, although not specifically relating to the business of insurance, apply to fraudulent advertising by an accident and health insurance company in a state having a statute prohibiting the use of such advertising within the borders of the state. Implicit in the decision is the view that the federal action did not in any manner "invalidate, impair, or supersede" the state law.

envisioned by Congress. S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2.

C. THE PURPOSE OF THE MCCARRAN-FERGUSON ACT WAS TO REMOVE FEDERAL IMPEDIMENTS TO THE EXECUTION OF STATE POLICIES, AND NOT TO BAR FEDERAL ACTION WHOLLY CONSISTENT WITH SUCH POLICIES

As we have already indicated (*supra,* pp. 35–39), the basic distinction is between (1) state insurance laws sanctioning what federal law forbids and (2) state insurance laws prohibiting what federal law also forbids. We believe that the courts below, in holding that the mere enactment of state insurance laws relating to false advertising precluded Commission jurisdiction, erred in failing to draw this distinction.

As the *North Little Rock* case (*supra,* p. 37) suggests, certain federal laws may be rendered inapplicable by the mere enactment of specific state insurance laws in the first category;[31] for, in that event, there is an obvious collision between federal and state policy and Congress has decreed that state policy should be controlling. But as to the second category, there is no such conflict. Until the state authorities act to apply this common policy to the

[31] Even this statement is subject to the exception in Section 3 (b) as to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." See note 21, *supra.*

same transaction,[32] there would seem to be no substantial reason why the federal and state governments should not both have jurisdiction. Certainly complementary regulation of this nature is in no sense unusual. See, *e. g., Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, and *United States* v. *Public Utilities Commission of California,* 345 U. S. 295, both involving a strikingly similar statutory provision in the Federal Power Act;[33] see also discussion of the Twenty-first Amend-

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[32] See note 24, *supra.* Of course, once the Federal Trade Commission asserts its jurisdiction over the specified practices of a particular insurance company by issuance of a complaint, the Commission would not lose that jurisdiction by the subsequent issuance of a similar complaint by a state agency. Cf. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 196; *Princess Lida* v. *Thompson,* 305 U. S. 456. We do not suggest that the Commission's issuance of a complaint precludes an interested state from instituting a proceeding of its own; the point, rather, is that such state action, in itself, does not affect the Commission's jurisdiction to continue its proceedings. Presumably conventional rules of *res judicata* would eliminate any possibility of conflicting judgments or orders. *Id.* at 465–466.

[33] The provision (16 U. S. C. 824 (a)) states:

> It is hereby declared that the business of transmitting and selling electric energy * * * is affected with a public interest, and that Federal regulation of matters relating to * * * the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.* [Emphasis added.]

In both cases, this Court held that the italicized portion of the quoted provision "cannot nullify a clear and specific grant of jurisdiction [to the Federal Power Commission], even if the particular grant seems inconsistent with the broadly expressed purpose." 324 U. S. at 527; 345 U. S. at 311.

ment and the *Frankfort Distilleries* case, *supra*, pp. 39–41.

To hold that the mere enactment of state laws in the second of the two categories ousts the Commission of jurisdiction is to distort and defeat the purpose of the McCarran-Ferguson Act. As this Court recognized in *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, 429–430, that purpose "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation" and by affirmatively declaring the business of insurance to be subject to state regulation and taxation. Cf. *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.*, 348 U. S. 310, 319. This purpose is completely consistent with, and effectuated by, the Commission's action in undertaking to stop false and misleading advertising in the interstate sale of insurance. Such action, for the reasons already stated (*supra*, pp. 35–39), does not in any way interfere with the execution of state insurance policies. Quite the contrary, federal regulation of this nature serves to supplement the limited power of the states in carrying out those policies.

It is axiomatic that a statute does not exist in a vacuum but represents a concrete response to a particular legislative problem which must be taken into account in construing the statute. "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate

a plan of government." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 538–539. This principle is double-edged in its effect; if consonant with other considerations, the statute should be construed broadly enough to reach the object of legislative concern, but at the same time not so broadly as to cover matters outside the scope of the problem which gave rise to the legislation. In the instant case, there is no basis for believing that Congress, in enacting the McCarran-Ferguson Act, was concerned with a problem of concurrent jurisdiction of federal and state regulatory bodies in areas where no conflict exists. On the contrary, the legislative problem was whether the states should be permitted to continue their regulation of the insurance business and, if so, whether such regulation should yield to *contrary* federal legislation. See *infra,* pp. 59–60. In other words, the problem was whether the states should have jurisdiction, not whether they should have *exclusive* jurisdiction; whether state law should be controlling in the event of a conflict, not whether state regulation should be permitted to "pre-empt" the field even in the absence of a conflict. The Commission's construction of the Act, as we have shown, in no way impinges on Congress' resolution of that problem.

In providing that the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law," Congress was dealing, we think, with mat-

ters of substance and not form,[34] and was referring to "regulation" in fact—*i. e.*, state action which actually takes hold of the conduct involved. In this view, legislation and "regulation" are far from being synonymous.[35] Where, for example, a state law authorizes the maintenance of rate-fixing bureaus and no implementing administrative action is needed, the transaction is "regulated by State law" in a very concrete sense; the statute is self-executing and the regulatory action is implicit in the statute itself. But where a statute, instead of sanctioning a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no "regulation" in fact.

This is especially true where the prohibitory legislation is as general in scope as the state statutes involved in the instant cases. In the language of the Federal Trade Commission Act, these statutes broadly condemn "unfair methods of competition" and "unfair or deceptive acts or practices."[36] Without administrative elaboration of these standards and application in individual cases, such legislation—far from being "regulation" in fact—only

> represents inchoate law in the sense that it does not lay down rules which call for immediate compliance on pain of punishment by

[34] See, *e. g.*, the statement of President Roosevelt (*infra*, p. 65) on signing the bill.

[35] See statement of Senator McCarran (*infra*, pp. 57–58).

[36] See note 23, *supra*.

> judicial process. The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion. The statute, in order to rule any individual case, requires an additional exercise of discretion and that last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.

Mr. Justice Jackson in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 486–487 (dissenting opinion).[37] This Court's description of the Federal Trade Commission is also applicable to the state agencies charged with administering similar statutes: "In administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially."[38]

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[37] It should be noted that in this respect there was no disagreement between Mr. Justice Jackson and the majority opinion.

[38] See also *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347, 356–357: "The truth is, the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by

Humphrey's Executor v. *United States*, 295 U. S. 602, 628. Unless and until this process of "filling in and administering the details embodied by [the] general standard" is consummated in individual cases, to that extent the "business is not regulated by State law." [39]

D. THE LEGISLATIVE HISTORY OF THE MCCARRAN-FERGUSON ACT SUBSTANTIALLY SUPPORTS THE COMMISSION'S CONSTRUCTION

The effect of the McCarran-Ferguson Act, we think, was to authorize the states to continue to tax and regulate the business of insurance, irrespective of restraints upon such taxation and regulation that might flow from the Commerce Clause. But, as we have shown, the Act did not preclude the federal government from cooperating with the states in effectuating regulatory policies common to federal and state governments alike. Though in cases of conflict the policy of regulation was to be established by the states unless Congress specifically provided otherwise, where the purpose to be accomplished by state and federal regulation ran hand in hand, as here, both state laws and the Federal Trade Commission Act were to apply. The legislative history of the McCarran-Ferguson Act supports this construction.

Even before the Supreme Court's decision in the *South-Eastern Underwriters* case, but in anticipa-

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the Board of Trade. * * * it was the intention of the Legislature, having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade."

[39] See note 32, *supra*.

tion of the possibility that the Court might hold the Sherman Act applicable to the business of insurance, three identical bills were introduced in the 78th Congress which would have made the Sherman and Clayton Acts wholly inapplicable to the business of insurance. H. R. 3269; H. R. 3270; S. 1362. These bills provided that nothing contained in the Sherman or Clayton Acts "shall be construed to apply to the business of insurance or to acts in the conduct of that business or in anywise to impair the regulation of that business by the several States." None of these bills was enacted. The Federal Trade Commission Act was not mentioned in these bills or the committee reports. S. Rep. No. 1112, 78th Cong., 2d Sess.; H. Rep. No. 873, 78th Cong., 1st Sess.

The bill (S. 340) that became the McCarran-Ferguson Act was introduced early in the 79th Congress, 1st Session, by Senators McCarran and Ferguson, and was reported favorably by the Senate Judiciary Committee on January 24, 1945. S. Rep. No. 20, 79th Cong., 1st Sess. About the same time, Congressman Walter introduced an insurance bill in the House (H. R. 1973) which was reported favorably by the House Judiciary Committee on February 8, 1945. The McCarran-Ferguson bill was amended on the floor of the Senate and as amended passed the Senate. It was referred in the House to the Judiciary Committee. That Committee struck the entire substance of the bill, substituting therefor the language contained in the Walter bill, and reported S. 340 as thus amended. H. Rep. No. 143, 79th Cong., 1st Sess. The bill as reported passed the House. A Conference Committee

was appointed, composed of Senators McCarran, O'Mahoney, and Ferguson and Congressmen Sumners, Walter, and Hancock. The Conference Committee added to the bill the Section 2 (b) proviso, continuing the application of the Federal Trade Commission Act "to the extent that such business is not regulated by State law." The bill reported by the Conference Committee (H. Rep. No. 213, 79th Cong., 1st Sess.) was passed by both Houses of Congress and approved by the President on March 9, 1945.

The "Statement of the Managers on the Part of the House," attached to the bill reported by the Conference Committee (*id.*, p. 3), is significantly silent on the addition of the Section 2 (b) proviso. And the earlier House and Senate reports on S. 340 declare the purpose "to secure adequate regulation and control of the insurance business" (S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2). As already shown (*supra*, pp. 41–49), "adequate regulation" cannot be accomplished under the construction adopted by the courts below, which, though there is no conflict here between the state laws and the Federal Trade Commission Act, leaves the advertising practices of insurance companies beyond the scope of effective regulation where such companies operate on a nation-wide or multi-state basis.

The courts below relied upon certain general remarks made by Senator McCarran on the floor of the Senate in the course of explaining the changes made by the Conference Committee (A. R. 115–116; N. R.

223–224). But these remarks are in no way inconsistent with the construction urged here. Senator McCarran stated (91 Cong. Rec. 1443):

> During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, *to the extent that they regulate,* they will have taken the business of insurance in the respective States out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable. [Emphasis added.]

Senator McCarran further stated (*ibid.*): "The moratorium would not be continued; but if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective." The latter statement is really neutral in nature, since it merely rephrases the statutory language—namely, that the federal acts are applicable "to the extent that such business is not regulated by State law"; it tells nothing of Senator McCarran's conception of "regulated." But the quoted statement (*supra*) would seem to give affirmative support to the Government's position. It apparently distinguishes—as we have urged above—between legislation and "regulation." According to this statement, the federal acts shall not apply "If they [the states] enact such legislation, *to the extent that they regulate*". (Emphasis added.) Clearly the inference is that the mere enactment of "such legisla-

tion" is insufficient and that it is also necessary "that they regulate."[40]

Senator McCarran's remarks, moreover, must be read in conjunction with the statements of the other draftsmen of the proviso to Section 2 (b). Senator Ferguson, a co-sponsor of the bill and one of the Senate managers, stated (91 Cong. Rec. 1481):

> Mr. FERGUSON. Under the language which is now in the bill as it appears in the conference report, if a State passes an act regulating insurance or taxing insurance, *and that regulation is contrary to the Sherman Act or the Clayton Act,* with three exceptions, then the State law would be the law. * * *
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> In other words, under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the States were specifically to legislate upon a particular point, *and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act,* then the State law would be binding. That is exactly what we attempted to do in the bill. It is clear what we intended to do. * * * [Emphasis added.]

Senator Ferguson also recognized the inherent incapacity of the states adequately to regulate the interstate business of insurance. He stated (91 Cong. Rec. 1484): "If the Senator's statement was that the

[40] See note 32, *supra.*

proposed act would permit a State to regulate interstate commerce—insurance is interstate commerce—in the various States, the State could not do it."

During the Senate debates, no reference was made to the regulation of false and misleading advertising. Rather, the problem to which attention was directed was the impact on the Sherman Act of state laws authorizing conduct (*e. g.*, rate-fixing) which, apart from the McCarran-Ferguson Act, would under *South-Eastern Underwriters* be in violation of the Sherman Act. 91 Cong. Rec. 1442–1444, 1477–1488. But Senator O'Mahoney, one of the Senate managers of the bill, gave specific assurances that the Federal Trade Commission Act and the other Acts referred to in Section 2 (b) would become fully applicable upon the expiration of the moratorium, and that the bill would not delegate to any state the power to legislate in the field of interstate or foreign commerce (91 Cong. Rec. 1483):

> Mr. O'MAHONEY. Mr. President, there is *not a line or sentence in the proposed act,* as I have read it, *which would delegate to any State the power to legislate in the field of interstate and foreign commerce. State regulation must be for the State and not for the United States.* The bill does not sacrifice the power of Congress to regulate in the field of interstate commerce, but, wisely, it seems to me, undertakes to say in effect to the State, "For this period take the responsibility and regulate insurance in the interest of the public."
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> Mr. PEPPER. Not for this period; but indefinitely.

Mr. O'MAHONEY. For this period so far as the antitrust laws are concerned, it would be a moratorium.

Mr. PEPPER. Oh, we are not talking about a moratorium; we are talking about the period beyond the moratorium.

Mr. O'MAHONEY. Mr. President, the Senator cannot separate his interpretation of the conference report from the word "moratorium." *It is the purpose of the proposed act to grant a moratorium.* It would be an absurd construction to say that in one section of the law a moratorium is provided, but in another section it is provided that there shall be no moratorium.

Within its own boundaries the State may authorize agreements for rate making just as the Congress of the United States, by passing the Interstate Commerce Act, authorized rate making by combinations in the railroad field, and just as practically every State in the Union has authorized public utility rate making within the States. But what I wish to say to the Senator from Florida, and other Senators as well, without any reservation, is this: *When the moratorium period passes, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act come to life again in the field of interstate commerce, and in the field of interstate regulation. Nothing in the proposed law would authorize a State to try to regulate for other States,* or authorize any private group or association to regulate in the field of interstate commerce. [Emphasis added.]

While there was no discussion whatever in the House of the effect of the addition of the proviso to Section 2 (b) by the Conference Committee, it is significant to note that before the conference at least two Representatives expressly stated their desire to continue the application of the Federal Trade Commission Act to false advertising of insurance. Section 3 of both the Senate and House versions of S. 340 before it went to conference fully exempted the business of insurance from the Federal Trade Commission Act and the Robinson-Patman Act. This section, however, was eliminated by the Conference Committee, and the two Acts were included in the provision declaring a moratorium (Section 3 (a)), which in both the Senate and House versions had applied only to the Sherman and Clayton Acts. This action, it seems clear, was taken as a result of the debate in the House on the bill before it went to conference. During this debate, the following statements were made:

> Mr. COCHRAN. Mr. Speaker, I am in favor of giving the insurance companies of the country an opportunity to adjust themselves to the decision of the Supreme Court, but I am not in favor of the House bill as it was reported by the Committee on the Judiciary. If you look at section 3 of the bill you will find that it exempts all the business of insurance companies and agents from the original Federal Trade Commission Act, and all amendments thereto, as well as the Robinson-Patman Act; in my opinion no honorable insurance company or honorable agent would want to be exempted from these acts. It will give an opportunity to fly-by-night insurance agents and companies

to indulge in all the false advertising they desire, and they will be exempt from prosecution if that provision in the bill stands.

* * * * *

I sincerely hope that this matter will be thoroughly considered by the Judiciary Committee and before this bill is called up that the committee will agree to eliminate section 3.

I will not vote for the bill as it was reported by the committee unless section 3 is stricken from the measure. [91 Cong. Rec. 1027–1028.]

* * * * *

Mr. COCHRAN. The gentleman [Mr. Walter] certainly does not want to stand on the floor of this House and tell the Members that he is in favor of insurance companies or insurance brokers putting out false advertising in connection with the conduct of their business.

Mr. WALTER. Well, if they do, it seems to me that is a matter that can be very easily reached. We are not concerned with things of that sort. This is merely a moratorium. That is all it is. It is to give these people a breathing spell so that they can decide how they may operate their business in the future. That is all this is; it is a moratorium.

Mr. COCHRAN. I agree with the gentleman that far, but when he says "we" I do not know for whom he speaks. I, as one Member, will not vote for the moratorium if you leave section 3 in the bill. [91 Cong. Rec. 1086.]

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Mr. BAILEY. * * * There is a third major reason why this legislation is objectionable. It creates a "no man's land" zone in which irresponsible, fly-by-night concerns, not able to

> qualify in any State, continue to ply their trade of selling policies through the mails, by newspaper advertising and over the radio. It is estimated that millions of dollars have and are being invested in this worthless form of insurance. These practices are beyond State regulations and are just one more proof that a sizable part of the insurance, if regulated at all, must come under the commerce clause of our Constitution as was recently affirmed by our Supreme Court.
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> * * * * *
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> * * * Two simple amendments which I shall offer (a) to remove discrimination in rates, (b) to effectively control and safeguard our citizens against fake and worthless insurance, would make this proposed legislation entirely satisfactory. [91 Cong. Rec. 1092.]

Thus the legislative history of the McCarran-Ferguson Act as a whole furnishes substantial support for the Commission's construction of the Act. Senator McCarran's statements are fully consistent with the Government's position. Senator Ferguson, a cosponsor of the Act, indicated that it was only in cases of conflict of policy that state enactments would serve to divest the Commission of interstate jurisdiction over the business of insurance; indeed, Senator Ferguson even disclaimed any intention to let the states regulate interstate commerce at all. Senator O'Mahoney, one of the Senate managers of the bill and as such a coauthor of the proviso to Section 2 (b), assured the Senate that after the expiration of the moratorium the Federal Trade Commission Act would again become fully applicable to the business of insurance.

And members of the House expressed their desire that the application of the Federal Trade Commission Act to false advertising by insurance companies be preserved.

The Commission's construction of the Act is also in accord with the expressed understanding of President Roosevelt in signing the bill into law. The President stated in pertinent part:

> After the moratorium period, the antitrust laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, *and are effectively performing that responsibility,* for the regulation of whatever aspect of the insurance business may be involved * * *."[41] [Emphasis added.]

All of the available evidence indicates, in short, that Congress did not by the McCarran-Ferguson Act intend to oust the Commission of jurisdiction, in the circumstances of these cases, to join with the states in stopping deceptive practices which the states themselves have declared to be unlawful.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed, and the cases remanded to the Courts of Appeals with directions to consider the merits of the Commission's

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[41] White House Press Release, March 10, 1945; 15 L. & Contemp. Prob. 478.

decisions that respondents have engaged in false and misleading advertising practices in violation of the Federal Trade Commission Act.

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MARCH 1958.

APPENDIX

1955 SUPPLEMENT TO GENERAL STATUTES OF KANSAS, ARTICLE 24, REGULATION OF CERTAIN TRADE PRACTICES, SECTIONS 40–2401—40–2414

40–2401. PURPOSE OF ACT. The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

40–2402. DEFINITIONS. When used in this act: (a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, mutual nonprofit hospital service corporation, nonprofit medical service corporation, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. (b) "Commissioner" shall mean the commissioner of insurance of this state.

40–2403. UNFAIR METHODS OF COMPETITION OR UNFAIR AND DECEPTIVE ACTS OR PRACTICES; PROHIBITED. No person shall engage in this state in any trade practice which is defined in this act as, or determined pursuant to this act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

40-2404. SAME; CERTAIN METHODS, ACTS OR PRACTICES DEFINED AS UNFAIR. The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) *Misrepresentations and false advertising of policy contracts.* Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement which is misleading or misrepresents the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statements as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) *False information and advertising generally.* Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) *Defamation.* Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) *Boycott, coercion and intimidation.* (a) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance, or (b) by any act of boycott, coercion or intimidation monopolizing or attempting to monopolize any part of the business of insurance.

(5) *False financial statements.* (a) Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive. (b) Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its conditions or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) *Stock operations and advisory board contracts.* Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance: *Provided,* That nothing herein shall prohibit the acts permitted by section 40–232 of the General Statutes of 1949 or any amendments thereto.

(7) *Unfair discrimination.* (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) *Rebates:* (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not speci-

fied in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract. (b) Nothing in subsection 7 or paragraph (a) of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance: *Provided,* That any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year: *Provided,* That nothing in this act shall prohibit the issuance of policies containing benefits set out in section 40–430 of the General Statutes of 1949 or any amendments thereto.

(9) *Statutory violations.* Any violation of any of the provisions of sections 40–1409 or 40–1515 of the General Statutes of 1949 or any amendments thereto.

40-2405. SAME; POWER OF COMMISSIONER. The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section 3 [40-2403] of this act.

40-2406. SAME; POWERS AND DUTIES AS TO HEARINGS; SERVICE OF PROCESS. (a) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in section 4 [40-2404] of this act, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten (10) days after the date of the service thereof. (b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person. (c) Nothing contained in this act shall require the observance at any such hearing of formal rules of pleading or evidence. (d) The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers,

records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the district court of Shawnee county or the county where such party resides, on application of the commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof. (e) Statements of charges, notices, orders, and other processes of the commissioner, under this act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement notice, order or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

40–2407. SAME; CEASE AND DESIST ORDERS. (a) If, after such hearing, the commissioner shall determine that the method of competition or the act or practice in question is defined in section 4 [40–2404] and that

the person complained of has engaged in such method of competition, act or practice in violation of this act, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice. (b) Until the expiration of the time allowed under subsection (a) of section 8 [40–2408] of this act for filing a petition for review if no such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the district court, as hereinafter provided, the commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section. (c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

40–2408. SAME; JUDICIAL REVIEW OF CEASE AND DESIST ORDERS. (a) Any person required by an order of the commissioner under section 7 [40–2407] of this act to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in section 4 [40–2404] may obtain a review of such order by filing in a court of competent jurisdiction of this state, within sixty (60) days from the date of the service of such order, a written petition praying that the order of the commissioner

be set aside. A copy of such petition shall be forthwith served upon the commissioner, and thereupon the commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by evidence, shall be conclusive. (b) To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which if supported by evidence shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order, with the return of such additional evi-

defense. (c) A cease and desist order issued by the commissioner under section 7 [40–2407] of this act shall become final: (1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time, except that the commissioner may thereafter modify or set aside his order to the extent provided in subsection (b) of section 7 [40–2407] of this act; or (2) upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed. (d) No order of the commissioner under this act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

40–2409. SAME; METHODS, ACTS OR PRACTICES NOT DEFINED; PROCEDURE. (a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in section 4 [40–2404], that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten (10) days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section 6 [40–2406] of this act. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person. (b) If such report charges a violation

of this act and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after ten (10) days after the service of such report cause a petition to be filed in a court of competent jurisdiction of this state within the district wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public *pendente lite.* (c) A transcript of the proceedings before the commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence. (d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by evi-

dence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

40–2410. SAME; JUDICIAL REVIEW BY INTERVENOR, WHEN. If the report of the commissioner does not charge a violation of this act, then any intervenor in the proceedings may within thirty (30) days after the service of such report, cause a petition to be filed in the district court of Shawnee county for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this act.

40–2411. SAME; PENALTIES FOR VIOLATION OF CEASE AND DESIST ORDERS. Any person who violates a cease and desist order of the commissioner issued under section 7 [40–2407], after it has become final, and while such order is in effect, shall, upon proof thereof to the satisfaction of the court, forfeit and pay to the state of Kansas a sum not to exceed one thousand dollars ($1,000), as determined by the court, for each violation, which may be recovered in a civil action, except that, if such violation is found to be willful, the amount of such penalty shall be a sum not to exceed five thousand dollars ($5,000), and it shall be the duty of the attorney general to prosecute for the recovery of such forfeitures; and in addition thereto, any violation of a cease and desist order of the commissioner issued under section 7 [40–2407] of this act, after it has become final, and while such order is in effect, by any insurance company or agent licensed in this state shall be sufficient ground for the revoca-

tion by the commissioner of the certificate of authority of such company or license of such agent.

40-2412. SAME; PROVISIONS ADDITIONAL TO EXISTING LAW. The powers vested in the commissioner by this act, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

40-2413. SAME; IMMUNITY FROM PROSECUTION, WHEN. If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding: *Provided, however,* That no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this state. Any such individual may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immunity or privi-

lege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

40–2414. SAME; INVALIDITY OF PART. If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957 Nos. 435 and 436

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL
AND
LIFE INSURANCE COMPANY

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

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BRIEF OF ATTORNEY GENERAL OF MICHIGAN, AMICUS CURIAE

In Which the Several States Shown on the Appendix Have Joined Through Their Attorneys General (Names of Other Attorneys General see Reverse Side of Cover)

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BRIEF OF ATTORNEY GENERAL OF MICHIGAN, AMICUS CURIAE

In Which the Several States Shown on the Appendix Have Joined Through Their Attorneys General

INTEREST OF THE STATES

For over 100 years the states have had the responsibility for the regulation of the insurance business. During most of that time, insurance was not considered to be commerce. The federal government was without power to regulate insurance under the commerce clause, and the states had full regulatory power unrestricted by the commerce clause. In *United States v. South-Eastern Underwriters Assn.*, 322

US 533 (1944), the Supreme Court for the first time held insurance to be commerce. Nine months later Congress enacted the McCarran Act.

Over this long period of time the states have developed comprehensive regulatory systems governing insurance. Each state has an insurance department headed by a state official and staffed by examiners, actuaries and others experienced in the insurance business. Each state has a detailed set of laws designed specifically for regulation of this business. These laws govern all aspects of the business, including such matters as the licensing of companies and agents, approval of policy forms, examination of financial stability, regulation of reserve requirements, supervision of investments, election of officers and directors, regulation of unfair or deceptive acts or practices, and, in the cases of some types of insurance, the rates which may be charged.

As one part of this regulatory system, the states have for many years concerned themselves with insurance advertising. Prior to the McCarran Act, most of the states had provisions in their insurance codes regulating such advertising in one form or another. Subsequent to that Act, a great majority of the states adopted the Model State Fair Trade Practices Act, which is patterned after the Federal Trade Commission Act, contains the same broad proscription against all "unfair methods of competition or unfair or deceptive acts or practices," and specifically prohibits the use of misleading advertising in connection with all types of insurance. This Model Act was sponsored by the National Association of Insurance Commissioners and was enacted by the states for the specific purpose of accepting the invitation to state regulation expressed by Congress in the McCarran Act. At present, the Model Act is in force in 41 states, Alaska, Hawaii and Puerto Rico; five other

states and the District of Columbia have statutes which, although differing somewhat from the Model Act, specifically regulate all insurance advertising; and two states have statutes which specifically regulate the advertising of life insurance companies plus general statutes which prohibit misleading advertising in connection with anything offered to the public for sale.

In the two cases at bar, the Federal Trade Commission has held, in three-to-two decisions, that despite the McCarran Act it has jurisdiction over all advertising used in connection with the interstate sale of insurance regardless of the existence of state statutes regulating the same advertising. In its decisions and in the Courts below, the Commission rested this conclusion on the premise that the states have no power to regulate the "interstate aspect" of transactions "in" interstate commerce. In its brief in this Court, the Commission shifts to the contention that the states cannot "effectively" regulate interstate insurance transactions, so that in the absence of federal control there would be a regulatory void. It also argues that the McCarran Act should be construed to mean that the Federal Trade Commission Act is applicable to insurance to the extent that the business is not regulated by "inconsistent" state law.

The position of the Commission seriously concerns the states for at least three reasons:

First, the broad contention that the states cannot effectively regulate interstate insurance transactions is a challenge to the efficacy of all state regulation. In the McCarran Act, Congress "put the full weight of its power behind" state legislation, as this Court held in *Prudential Insurance Co. v. Benjamin*, 328 US 408, 431 (1946). Yet the Federal Trade Commission now says that nevertheless there would

be a regulatory void in the absence of concurrent federal regulation. If this is true of the business of insurance, it would be doubly true of state regulation in other fields where commerce clause inhibitions have not been removed. The net effect of the Commission's position is that whenever interstate commerce is involved the states are powerless to protect even their own citizens, and only the federal government can do so.

Second, the Commission's decision would nullify both the basic purpose and the express language of the McCarran Act. The Act declares "that the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "the business of insurance • • • shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The states have acted in the belief that by this language Congress meant that the states (not the federal government) should have the responsibility for the regulation of the insurance business. More specifically related to the present issue, the proviso of Section 2(b) of the McCarran Act states that after the moratorium period the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." The states have understood this provision to be an invitation to the states to enact legislation covering the area of the Federal Trade Commission Act, and a declaration that to the extent the states do so the federal Act shall not be applicable. Pursuant to this invitation, the states have since the enactment of the McCarran Act adopted numerous statutes designed to regulate in this area and thereby make federal regulation unnecessary. The instant decisions of the Federal Trade Commission, however, result in nullifying the invitation and declaration by saying that state laws in this interstate area are ineffective and state

action in adopting regulatory statutes of this nature are nugatory in so far as Commission jurisdiction is involved.

Third, the conclusion of the Commission that both state and federal laws should be applicable to interstate insurance transactions so long as the statutes are consistent would necessarily lead to duplicative and conflicting regulation. The instant circumstances provide a good example. Both the Federal Trade Commission Act and the state statutes broadly proscribe "unfair methods of competition" and "unfair or deceptive acts or practices." Both are enforceable initially by administrative agencies. As applied to offensive advertising, duplicative restraining orders would be unnecessary and wasteful. Conflicting orders would lead to endless controversy and confusion, resulting in serious impairment of purposeful state regulation.

SUMMARY OF ARGUMENT

The proviso of Section 2(b) of the McCarran Act states that the Federal Trade Commission Act and the other federal Acts there named "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." Despite this language, the Commission has held that it has jurisdiction over all advertising used in connection with the interstate sale of insurance regardless of the existence of state laws regulating the same advertising in every state in which it is used.

The Commission concedes that the states have the power to regulate interstate insurance transactions without limitation from the commerce clause. It also concedes that under the proviso the Federal Trade Commission Act would be inapplicable in the case of a conflict with state laws.

The Commission argues, nonetheless, that despite this broad authority in the States, it has an area of jurisdiction over the business of insurance to the extent that such business is not regulated by "inconsistent" state law. It also argues that the states cannot effectively regulate interstate insurance advertising, thus the proviso should be construed to mean that the federal Act is applicable to the extent that the business is not "effectively" regulated by state law. Neither argument has merit. The Commission's assumptions are gratuitous on this record and its construction of the McCarran Act distorts its meaning and purpose.

I

The Commission's argument that the proviso of Section 2(b) should be interpreted to mean that the Federal Trade Commission Act is applicable in the absence of inconsistent state law, is contrary to the language, the purpose and the legislative history of the McCarran Act. Moreover, adoption of the construction urged by the Commission would in fact lead to the serious impairment of state regulation.

The proviso itself is a complete answer to the Commission's contention. This proviso expressly defines the "extent" to which the Federal Trade Commission Act is to be applicable—"to the extent that such business is not regulated by State law." The Commission would change it to read—"to the extent that such business is not regulated by [inconsistent] State law." Congress could not have intended to leave any such important issue dependent on construction.

Consideration of the purpose for which Congress enacted the McCarran Act further refutes the Commission's contention. Prior to the *South-Eastern Underwriters* decision,

insurance was not considered to be commerce, and the states had full responsibility for the regulation of this business, unrestricted by the commerce clause. The prime purpose of the McCarran Act was to repose in the states both the authority and the responsibility for the regulation of the business of insurance.

To accomplish that purpose, Congress removed all commerce clause limitations on state regulation of insurance. In Section 3(a) Congress established a three-year moratorium during which the Federal Trade Commission Act and the other federal Acts there named "shall not apply" to the business of insurance. Thereafter, the proviso of Section 2(b) became operative to the extent there described.

Certainly Congress did not remove all commerce clause limitations and invite the states to legislate in the areas covered by the federal Acts named in Section 3(a) and the proviso of Section 2(b), under the conception that the states would obtain exclusive jurisdiction only when state laws conflicted with the federal Acts. State regulatory enactments to be effective in this field necessarily had to be consistent with large areas of existing federal law. Congress was not seeking to establish duplicative state and federal regulation of this particular business, to an extent greater than in other fields of business. Nor did Congress intend the moratorium as an invitation to the states to enact only inconsistent legislation. Congress knew that in many instances state laws would be consistent with the federal Acts. Congress intended that under the proviso the federal Acts would be inapplicable in either event.

The states so understood the McCarran Act, and accordingly a great majority of them have enacted the Model State Fair Trade Practices Act, which follows the pattern

of the Federal Trade Commission Act. More recently, more than half of the states have adopted a set of Rules Governing Advertisements of Accident and Sickness Insurance, which describe in detail the standards to be applied in determining whether such advertising is misleading, and which provide for periodic examination of all such advertising used by each company. Because of their broad supervisory powers over insurance companies, the states customarily handle all complaints with respect to advertising through informal procedures, and the various states have on numerous occasions used this means to correct insurance advertising practices which they considered to be improper.

The Senate debate on the proviso also demonstrates conclusively that Congress intended the Federal Trade Commission Act to be inapplicable to the extent that the states have legislated, regardless of whether such legislation is consistent or inconsistent with the federal Act.

Moreover, although the Commission contends that there could be no inconsistency either in the laws regulating advertising or in their administration, its own argument proves just the contrary. Most of the state laws, like the Federal Trade Commission Act, are broadly phrased and are enforceable initially through administrative procedures. Conflicts in interpretation and application to particular advertising would be inevitable. The Commission says that *res judicata* would apply so as to prevent conflicting orders. If this is accepted as sound, it is difficult to conceive of a more direct impairment of state regulation. Should the Commission enter its order first, it would be binding on all of the states. No matter what their independent judgment might be, state regulatory agencies could not disagree in any respect on either the merits or the relief to be directed. Actually the conflict would cut much deeper. On the Com-

mission's theory, it would always have jurisdiction in the absence of a state order. The very absence of state action, however, may well mean that the state has investigated the practice and determined that it is not objectionable.

II

The Commission's contention that the proviso of Section 2(b) should be construed to make the Federal Trade Commission Act applicable to the extent that insurance is not "effectively" regulated by state law is in direct conflict with the language and the legislative history of the proviso. Moreover, the Commission is in error in asserting that a state cannot effectively regulate insurance advertising reaching its citizens through interstate channels.

Again the Commission is seeking to amend the proviso. Its construction would require the addition of the word "effectively," so as to make the proviso read that the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not [effectively] regulated by State law." Not only does such a construction find no support in the statute, but it is refuted by the legislative history.

In addition, it is clear that the states can effectively regulate advertising which has moved in interstate commerce. In the cases at bar, both companies are licensed in every state in which they advertise and sell insurance. It is not material in the view of the majority of the Commission whether each state has a statute regulating the insurance advertising reaching its citizens. It is beyond dispute that a state has the power to regulate insurance transactions having consequences within its borders even though interstate commerce is involved.

In essence, the Commission is here arguing that where interstate insurance transactions are involved federal regulation is more effective than state regulation. That question, along with others, was fully debated by Congress when it considered the McCarran Act, and was resolved in favor of the states.

ARGUMENT

Introduction

The proviso of Section 2(b) of the McCarran Act states that the Federal Trade Commission Act and the other federal Acts there named "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

In the two cases at bar each company is licensed in every state in which it advertises, sells policies, and conducts its business. Its business is conducted through agents who are similarly licensed. Each state has a law regulating the insurance advertising which reaches its citizens whether the advertising comes from within or from without the state's borders. Despite these state regulatory controls the Federal Trade Commission has held that it has jurisdiction over all advertising used by the two companies in connection with the interstate sale of insurance.

In its opinion (A.R. 73-80)[1] and in the Courts below (A.R. 116, N.R. 220-221), the Commission sought to support its interpretation of the McCarran Act on the theory that every interstate advertising transaction is divided

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[1] "A.R." refers to the printed record in American Hospital, "N.R." to the record in National Casualty.

into two separate aspects: one interstate, and the other intrastate. The Commission asserted that the states lacked the constitutional power to regulate the interstate aspect.

The Commission has now shifted its position. It still contends for the same broad jurisdiction, but it turns to different supporting arguments. In its brief in this Court, the Commission concedes that the states have the power to regulate interstate insurance transactions uninhibited by the commerce clause (Pet. Br. 38, 41, 55). It also concedes that under the proviso of Section 2(b) the Federal Trade Commission Act would be inapplicable in the event of a conflict with state laws (Pet. Br. 37, 39, 49). The Commission argues, however, that the proviso should be construed to mean that the Federal Trade Commission Act is to apply to insurance to the extent that such business is not regulated by "inconsistent" state law (Pet. Br. 49-52); and it says that here the laws are consistent and there could be no conflict in their interpretation and administration (Pet. Br. 35-41). The Commission also contends that the proviso should be construed to mean that the Federal Trade Commission Act is to apply to insurance to the extent that such business is not "effectively" regulated by state law; and it says that the states cannot effectively regulate interstate advertising (Pet. Br. 41-49).

We submit that each of these arguments is entirely without foundation. They do violence to the language of the McCarran Act. They would bring about a serious impairment of state regulation. And they misconceive the power of a state to protect its citizens against practices having consequences within its borders whether or not interstate commerce is involved.

I

The Commission's Contention that the Proviso of Section 2(b) Should be Construed to Mean that the Federal Trade Commission Act Shall be Applicable to the Business of Insurance to the Extent That Such Business Is Not Regulated By "Inconsistent" State Law is in Direct Conflict with the Language, the Purpose and the Legislative History of the McCarran Act; Moreover, the Commission's Theory would In Fact Lead to Constant and Serious Impairment of State Regulation.

A. The Language of the Proviso

The language of the proviso of Section 2(b) completely refutes the Commission's contention. This proviso expressly defines the "extent" to which the Federal Trade Commission Act is to be applicable. It does not say that the Federal Trade Commission Act shall be applicable "to the extent" that insurance transactions are "in" interstate commerce, or to the extent that the federal Act is consistent with state regulation, or to the extent that the Commission might consider state regulation to be ineffective. It says that the Federal Trade Commission Act is to apply to insurance "to the extent that such business is not regulated by State law." This can mean only one thing. If the matter is not regulated by state law, the Federal Trade Commission Act is to apply. If the matter is regulated by state law, the Federal Trade Commission Act is not to apply.

The construction advocated by the Commission would require the addition of the word "inconsistent," so as to make the proviso read that the Federal Trade Commission Act "shall be applicable to the business of insurance to

the extent that such business is not regulated by [inconsistent] State law." There simply is no basis for any such construction. Certainly had Congress intended so to restrict the proviso, it could and would have used language more clearly expressing such purpose. Congress could not have intended to leave any such substantial issue dependent on construction, nor could this have been a matter of Congressional oversight.

B. The Purpose of the McCarran Act

The conclusion that the Federal Trade Commission Act is not to apply to transactions which are regulated by state law (whether consistent or inconsistent) is required not only by the language of the proviso but also by a consideration of the purpose for which Congress enacted the McCarran Act.

For 75 years prior to the *South-Eastern Underwriters* decision, insurance was not considered to be commerce. As a result, the federal government had made no attempt to regulate this important business. Full responsibility in this regard had rested on the states, and in meeting that responsibility the states had adopted comprehensive systems of insurance regulation. Under these circumstances the states had "inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition." *Prudential Insurance Co. v. Benjamin*, 328 US 408, 417 (1946).

The *South-Eastern Underwriters* decision cast doubt on the validity of many of these state statutes, and also created problems with respect to the application to insurance of various federal statutes which pertained to commerce generally, but which Congress had adopted without having

insurance in mind. Congress enacted the McCarran Act to eliminate this confusion. The Act's basic purpose is clearly expressed in Sections 1 and 2(a). Section 1 declares "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." Section 2(a) provides that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

This purpose is further carried out by Section 3(a) and the proviso of Section 2(b). Section 3(a) established a moratorium during which the Federal Trade Commission Act and the other federal Acts there named "shall not apply" to the business of insurance. After the moratorium, the proviso of Section 2(b) came into play, stating that those statutes "shall be applicable" to insurance to the extent there described.

The intent of Congress is thus made clear. Its obvious purpose was to repose in the states not only the authority but also the responsibility for the regulation of this business. That is the meaning of Sections 1 and 2(a). Congress wanted to make certain, however, that the insurance business would be regulated within the areas covered by the statutes named in Section 3(a) and the proviso of Section 2(b). Since this was to be the responsibility of the states, Congress gave them three years during which to revise their laws to undertake that responsibility. To the extent that the states did so, the federal Acts were not to apply; to the extent that the states did not do so, the federal Acts were to apply so as to eliminate the possibility of a regulatory void in these areas.

The construction urged by the Commission would do violence to this entire statutory pattern. Certainly Congress did not remove all commerce clause limitations, and invite

the states to legislate in the areas covered by the federal Acts named in Section 3(a) and the proviso, under the conception that the states would obtain exclusive jurisdiction only where state laws conflicted with the federal Acts. State regulatory enactments to be effective in this field necessarily had to be consistent with large areas of existing federal law. The purpose of Congress in the McCarran Act was not to invite the states to legislate so as to establish duplicative state and federal regulation over the interstate aspects of this particular business, to an extent greater than in other fields of business. Rather, its purpose was to return to the states the authority and the responsibility for the regulation of the insurance business which had been theirs prior to the *South-Eastern Underwriters* decision.

Nor is it reasonable to assume, as the Commission apparently does, that Congress intended the moratorium as an invitation to the states to adopt only inconsistent legislation and the proviso as rendering the Federal Trade Commission Act inapplicable only in that event. The Federal Trade Commission Act broadly proscribes all "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." The Commission itself agrees that it is "inconceivable" that the states would enact statutes affirmatively sanctioning false insurance advertising (Pet. Br. 37, fn. 24). This is of course equally true with respect to most of the great number of practices prohibited by the Federal Trade Commission Act. Congress knew all of this. Obviously therefore Congress contemplated that the states would enact a considerable amount of consistent legislation, as well as some inconsistent legislation, and intended that under the proviso the federal Acts would be inapplicable in either event. Although the Commission stops short of saying so, it implies that in the proviso Congress was concerned solely with state laws authorizing rating-bureau activities in the field of casualty

insurance, which laws would be inconsistent with the Sherman Act (Pet. Br. 20, 32, 53, 60). Had this been the only purpose of Congress, surely it would have worded the proviso to say so.

It is significant to note that the states uniformly understood the statute as inviting them to assume the responsibility for the regulation of insurance, and acted accordingly. Following the enactment of the McCarran Act, the states, at the suggestion of the National Association of Insurance Commissioners, adopted several types of uniform insurance laws which were specifically designed to legislate in the areas covered by the Federal Trade Commission Act and the other federal statutes named in the proviso. Most pertinent for present purposes is the Model State Fair Trade Practices Act. That Act is patterned after the Federal Trade Commission Act, and specifically prohibits misleading insurance advertising as well as other unfair or deceptive acts or practices. (See, for example, the Kansas statute, appended to petitioner's brief.) This Model Act has now been adopted by 41 states, Alaska, Hawaii and Puerto Rico.

Moreover, in December, 1955, the National Association of Insurance Commissioners promulgated a set of Rules Governing Advertisements of Accident and Sickness Insurance, which implement the state statutes by spelling out in detail the standards to be applied in determining whether advertising is misleading. A copy of these Rules is reproduced as an appendix hereto (*infra*, pp. 1a to 12a). Already 27 states have adopted these Rules, with others expected to follow. It is to be noted that among other things the Rules require each company to file annually a certificate stating that it has complied with the Rules and the underlying state statute. Also, each company is required to maintain a complete file of all advertising used, which is subject

to regular and periodical inspection by the state Insurance Department (*infra*, p. 11a).[2]

Obviously the states undertook this vast regulatory program in the belief that the responsibility for insurance regulation rested on them. The Federal Trade Commission would have it, however, that all of this regulation is merely duplicative of the Federal Trade Commission Act and has had no effect whatsoever on the Commission's jurisdiction.

One more observation may be pertinent in this connection. Throughout its brief, the Commission repeats the statement that "the mere enactment of state laws" prohibiting misleading advertising should not deprive it of jurisdiction. It also suggests as an issue here, the absence of a showing that the states had taken action against the advertising in the two cases at bar (Pet. Br. 36). This case of course involves the meaning of the McCarran Act, not the extent of enforcement of the state laws. However, we do not wish to leave the impression that the states have been inattentive in the field of enforcement. Nor do we read the Commission's brief as inferring this to be the situation. We consider it inappropriate to state here any position on the merits of the advertising involved in the two cases at bar or to attempt to judge regulatory action or inaction. There is nothing in the record which bears on state enforcement in general. Nor could we in a document of this kind attempt to list all action, formal or

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Additionally, the National Association of Insurance Commissioners has prepared an Interpretive Guide which the Association has recommended for informal use by the various state Insurance Departments and the companies. The Guide is considerably more detailed than the Rules and sets out many examples of objectionable advertising of accident and sickness insurance.

informal, taken by the several states in correcting misleading advertising. It can fairly be said, however, that every state Insurance Commissioner investigates all complaints against insurance companies made to his Department, as well as improper practices brought to his attention through other means. This applies equally to advertising as it does to any of the multitude of other insurance activities which are regulated by the states.

The insurance business is extremely competitive. There are hundreds of insurance companies doing business through thousands of agents. Whenever a company engages in an unfair competitive practice, agents of competing companies are quick to bring the matter to the attention of the state Insurance Department. Policyholders within a state have ready access to their state Insurance Department for the purpose of complaining about any practice which they consider unfair. Most all of these matters are handled informally. Formal procedures are available if considered to be desirable or necessary. Complaints of substance are handled directly by the Insurance Commissioner or a member of his staff with the company involved. Since a state Insurance Department maintains constant supervision over the companies doing business in the state and has substantial enforcement powers, often including the authority to revoke a company's license for any law violation, this type of action brings immediate correction where necessary. This informal procedure may be readily applied to correct insurance advertising practices considered to be misleading or otherwise improper. State Insurance Commissioners have on a number of occasions taken such action.

C. The Legislative History of the McCarran Act

Since the language of the proviso of Section 2(b) is clear,

it is unnecessary under well established principles to turn to its legislative history as an aid to construction. Reference to this history, however, makes doubly clear the error in the Commission's attempted construction.

The proviso was added in conference. Consequently neither the Committee Reports nor any of the earlier history deals with it. The Conference Report (91 Cong. Rec. 1357) does not comment on the proviso, and the House approved the Report without debate (91 Cong. Rec. 1395-1396). The sole discussion of the proviso occurred in the Senate debate on the Conference Report. This debate unequivocally demonstrates that: (1) Congress intended the moratorium to give the states time to legislate in the areas covered by the statutes named in the proviso. (2) Congress intended that to the extent the states did so the Federal Trade Commission Act and the other statutes listed in the proviso should not be applicable. (3) Congress intended this result to follow regardless of whether the states enacted consistent or inconsistent statutes. (4) Congress rejected the notion that a state cannot effectively regulate interstate insurance transactions having consequences within its borders. The following excerpts, which include statements by Senators McCarran and Ferguson, who were co-authors of the bill and also Senate conferees, are pertinent (all emphasis added):

> "**MR. MURDOCK.** So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?
>
> "**MR. McCARRAN.** That is correct.
>
> "**MR. MURDOCK.** And it is intended that on the expiration of the moratorium the Sherman Act, the

Clayton Act, and the other acts mentioned will again become effective except—

"**MR. McCARRAN.** Except as the States themselves have provided regulations."[3]

• • •

"**MR. PEPPER.** • • • Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?

"**MR. McCARRAN.** The answer to that question is 'Yes.' During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable."[4]

• • •

"**MR. PEPPER.** • • • If there are reasons which make proper a moratorium for 3 years under the understanding that at the end of such a period of time the Clayton Act, the Sherman Act, and the other acts shall go into effect, well and good, but, so far as I am concerned, I shall not consent to postponing until

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[3] 91 Cong. Rec. 1442.

[4] 91 Cong. Rec. 1443.

January 1, 1948, the effective date of the law, and *according to the States the privilege of enacting some mild form of legislation which they may call regulatory,* thereby defeating the purpose of the Supreme Court decision and defeating the act itself. Apparently the conference report goes further than I had understood it to go. It does not stop with a moratorium at the end of 3 years. *At the end of 3 years the moratorium would continue if in the meantime a State had regulated the business to any extent whatever.* That would defeat the Supreme Court decision.

"**MR. McCARRAN.** The moratorium would not be continued; but *if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective.*"[5]

* * * * *

"**MR. FERGUSON.** * * * After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. *But insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.*"[6]

* * *

"**MR. PEPPER.** . . . the legal effect of the proviso which the Senator has just read is that a State can absolutely prevent the applicability of the Sherman Antitrust Act and the Clayton Act to insurance com-

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[5]
91 Cong. Rec. 1443.

[6]
91 Cong. Rec. 1443.

panies doing business in the State *by passing a State act which will make combinations and restraints of trade unlawful in that State.* As a practical matter, we know that the States cannot and will not enforce these laws against these insurance companies.

"MR. WHITE. Mr. President, is it not perfectly clear that the force and effect of these Federal statutes may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation? As I take it, there are two jurisdictions.

"MR. McCARRAN. There always are.

"MR. WHITE. There is the State, authorized to act to whatever extent seems proper.

"MR. McCARRAN. That is correct.

"MR. WHITE. Then the Federal Government can come in, and it does come in and may legislate beyond the limit of the State legislation.

"MR. McCARRAN. To the extent that the State does not regulate.

"MR. WHITE. To the extent that the State does not regulate.

"MR. MURDOCK. Mr. President, does the Senator from Maine take the position that, under the conference report, it becomes necessary for the Congress to act again affirmatively, subsequent to any State action taken?

"MR. WHITE. Not at all; that is not my view of the matter at all. My view is that the State may regulate. If however, the State goes only to the point indicated, then these Federal statutes apply throughout the whole field beyond the scope of the State's activity.

"MR. McCARRAN. That is a correct statement.

"MR. MURDOCK. Without any subsequent action on the part of Congress?

"MR. WHITE. Without any subsequent action on the part of Congress.

"MR. MURDOCK. I think that therein lies a very important feature of this whole matter. I agree thoroughly with the Senator from Maine that insofar as the States step into the picture affirmatively and act by regulation, they may do so. As the Senator from Wyoming has said, we convey no authority, we simply recognize their right to regulate. Insofar as they fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again."[7]

This legislative history shows conclusively that Congress had in mind no such distinction between consistent and inconsistent state regulation as the Commission suggests. Repeatedly during the debate several Senators, including Senators McCarran and Ferguson, made the flat statement that under the proviso the Federal Trade Commission Act and the other federal Acts mentioned would be inapplicable to the extent that the states legislated in those areas. In

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[7]
91 Cong. Rec. 1444.

no instance did the Senators in any way indicate that this result would turn on whether the state laws were consistent or inconsistent with the federal Acts.[8] Certainly if they had intended any such important distinction, they would have said so.

Even more significant, Senator Pepper at one point said that "the legal effect of the proviso which the Senator has just read is that a State can absolutely prevent the applicability of the Sherman Antitrust Act and the Clayton Act to insurance companies doing business in the State by passing a State act which will make combinations and restraints of trade *unlawful* in that State"; and Senator McCarran agreed with him (91 Cong. Rec. 1444, emphasis supplied). At another point, Senator Pepper objected to "according to the States the privilege of enacting some mild form of legislation which they may call regulatory," and argued that "at the end of 3 years the moratorium would continue if in the meantime a State had regulated the business *to any extent whatever*"; and Senator McCarran answered that, although the moratorium would not

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The Commission refers to one point where Senator Ferguson said that, if the states were to adopt legislation contrary to the federal statutes named in the proviso, the state laws would be binding (Pet. Br. 59). From this the Commission seeks to draw the conclusion that Senator Ferguson meant that the federal Acts would be inapplicable *only* in the event of inconsistency (Pet. Br. 64). No such conclusion is justified. Senator Ferguson was at that point merely answering a question addressed to him as to what the result would be in the case of inconsistent state laws. There is nothing in his statement to imply that he thought the result would be otherwise in the case of consistent state laws. As shown by the excerpts which we have quoted, Senator Ferguson flatly stated that after the moratorium if a state had not legislated on the subject the three federal Acts would be applicable, "but insofor as the State is concerned which has specifically legislated on the subject, the three acts shall not apply" (91 Cong. Rec. 1443).

continue, "if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective" (91 Cong. Rec. 1443, emphasis supplied).

At still another place, Senator Pepper pointed out that under the proviso the Federal Trade Commission Act and the other federal Acts would "not apply to the business of insurance except in a State which has not *regulated* the insurance business *or* to the extent a State has not *denied* the effect of such Federal acts"; he said he might not object if the proviso contained the limitation that the state regulation must be consistent with the federal Acts; but he did object to permitting the states to render the federal Acts inapplicable by means of inconsistent legislation; and Senator McCarran answered that "the Senator undoubtedly recognizes the fact that the Congress of the United States would not attempt to tell a State how and upon what subject it should legislate" (91 Cong. Rec. 1478, emphasis supplied).

All of this is in direct conflict with the Commission's argument that under the proviso only inconsistent state laws will render the Federal Trade Commission Act inapplicable. It is, in fact, difficult to see how the Commission can persist in its contention in the face of these clear indications of Congressional intent to the contrary.[9]

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To the extent that the present issue has been before the federal courts, the rulings are uniformly inconsistent with the Commission's view. In addition to the two decisions here under review, three other federal Courts of Appeals and two federal District Courts have had occasion to consider the meaning of the proviso of Section 2(b). North Little Rock Transp. Co. v. Casualty Reciprocal Exchange, 85 F Supp 961 (E.D. Ark. 1949), aff'd 181 F 2d 174 (C.A. 8, 1950), cert. den. 340 US 823; Crafts v. Federal Trade Commission, 244 F 2d 882 (C.A. 9, 1957), reversed on other grounds, 78 S Ct 33;

D. The Commission's Theory Would Lead to Constant and Serious Impairment of State Regulation

We have pointed out above that under the proviso of Section 2(b) the Federal Trade Commission Act is inapplicable in the event of either consistent or inconsistent state legislation. We now point out that, in addition, the Commission's contention that there could be no state-federal conflict either in the laws regulating misleading advertising or in the administration of those laws is wholly illusory. Its own argument proves just the contrary.

As the Commission agrees, most of the state laws, like the Federal Trade Commission Act, are couched in broad terms and are enforceable initially through administrative interpretation and application. In dealing with concepts as indefinite as "unfair methods of competition," or "unfair or deceptive acts or practices," or "misleading advertising," disagreements between state and federal administrative authorities would of course be inescapable. In the cases at bar, for example, the Commission disagreed with its Hearing Examiners on the merits as well as on jurisdiction. In *American Hospital* the Hearing Examiner held that none of the advertising was misleading (A.R. 26-58), but the Commission concluded it was misleading in three respects (A.R. 60-68). In *National Casualty* the Hearing Examiner found that one of the five charges of misrepresentation was not supported (N.R. 187-203), but the Commission concluded that all charges were proved (N.R. 204-210).

Miley v. John Hancock Mutual Life Ins. Co., 148 F Supp 299 (D. Mass., 1957), aff'd 242 F 2d 758 (C.A. 1, 1957), cert. den. 78 S Ct 38. In each instance, the court has either held or strongly implied that under this proviso state regulation renders the federal statutes inapplicable. In no instance did the court seek to distinguish between consistent and inconsistent state regulation, or suggest that the states could not effectively regulate interstate insurance transactions.

Similar conflicts between state and federal interpretations would be inevitable. As this Court said in *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 US 485, 490-491 (1953): "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The Commission seeks a way around this dilemma. Its argument runs as follows: Since the statutes are consistent, there would be no conflict until a state enters an order against particular advertising (Pet. Br. 49-50). The Commission points out that the states had entered no orders against the advertising in the two cases at bar (Pet. Br. 36). Once the Commission files its complaint, however, a state could not dislodge it from jurisdiction by filing a similar complaint, although both could proceed simultaneously (Pet. Br. 50, fn. 32). The doctrine of *res judicata* would apply to prevent inconsistent orders *(Ibid.)*.[10]

It is difficult to conceive of a more direct impairment of state regulation. Presumably the only instance in which the Commission would lack jurisdiction would be when a state held a hearing and concluded that the advertising was proper and the complaint should be dismissed. If the state entered its order first, the Commission could enter an identical one. But if the Commission's order came first, the states could no longer exercise their independent judgment. Perhaps they could enter an identical order. But they could not disagree in any respect on either

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[10]

In its decisions and in the Courts below, the Commission said that in the event of conflict its order would supersede a state's order (A.R. 75, Pet. Br. 37, fn. 24). In its petition for certiorari (No. 435, p. 18, fn. 10), it said that the state adjudication would be controlling. It now says that the first order entered would control.

the merits or the relief to be directed. This is the very kind of supersession of state regulation which the Commission elsewhere in its brief concedes is not permitted by the McCarran Act.

Actually the conflict would cut much deeper than this. The Commission's theory is that the very absence of a formal proceeding and final order in a state will give it jurisdiction, since in that event there can be no conflict. This overlooks the fact that the absence of a formal proceeding does not necessarily suggest that the enforcement agency is unaware of the matter. It may as well suggest that the agency has investigated fully and concluded there is nothing wrong. Under the Commission's theory nothing less than an order by the state agency would suffice even though it recited no more than a finding that no violation had occurred. Such a course of conduct requires the formalizing of every complaint. In this additional respect, therefore, the Commission's theory would lead to the serious impairment of state regulation.

The Commission also argues that the word "regulation" in the proviso may require something more than "legislation," and that in the case of state statutes broadly prohibiting "unfair or deceptive acts or practices" and requiring administrative implementation, there is no "regulation" within the meaning of the proviso until a state has entered an order in an individual case (Pet. Br. 52-55). Does the Commission imply that its jurisdiction under the proviso may depend on the forum designated by the state statute so that regulation would be complete and adequate if state legislation was enforceable directly in the courts and conversely inadequate if enforceable initially by administrative proceedings subject to court review? There is certainly nothing in the proviso to support any such strained

construction. The proviso uses the words "regulated by State law." Obviously this means "legislation."[11]

Both logical and practical considerations dictate but one conclusion. The proviso means that the Federal Trade Commission Act is to apply to the extent there is no state legislation, but is not to apply to the extent that there is state legislation. Congress made no distinction between consistent and inconsistent state and federal legislation. To read such a distinction into the statute would be directly contrary to the clearly expressed intent of Congress, and would in addition lead to serious impairment of state regulation.[12]

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[11]

The Commission refers (Pet. Br. 58) to a statement of Senator McCarran that "if [the states] do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts" (91 Cong. Rec. 1443). The Commission says this suggests that the Senator was distinguishing between "legislation" and "regulation." To the contrary, the language demonstrates that he was treating the two words as synonymous. In the next sentence, he said "if during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable." The Senate debate on the proviso (supra, pp. 19 to 23) makes it clear beyond doubt that Congress meant "regulated by State law" to mean "legislation."

[12]

The Commission suggests that the problem in the cases at bar is somewhat comparable to that in United States v. Frankfort Distilleries, Inc., 324 US 293 (1945), Connecticut Light and Power Co. v. Federal Power Commission, 324 US 515 (1945), and United States v. Public Utilities Commission of California, 345 US 295 (1953). Those cases are not in point. The problem here is the meaning of the proviso of Section 2(b). Those cases involved no provision even remotely comparable.

II

The Commission's Contention that the Proviso Should Be Construed to Mean that the Federal Trade Commission Act is to Apply to Insurance to the Extent that Such Business is Not "Effectively" Regulated By State Law Is in Direct Conflict with the Language and the Legislative History of the Proviso; and the Commission is in Error in Asserting that a State Cannot Effectively Regulate Insurance Advertising Reaching Its Citizens Through Interstate Channels.

The Commission now concedes that the commerce clause does not inhibit state power over insurance (Pet. Br. 38, 41, 55). It argues, however, that the states cannot effectively regulate interstate insurance transactions; that without federal regulation there would be a void in regulation; and that the proviso should be construed to mean that the Federal Trade Commission Act shall apply to the extent that the business is not "effectively" regulated by state law (Pet. Br. 41-49).[13]

We point out first that here again the Commission is seeking to add language to the proviso. The proviso states that the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such

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[13]

Comparing the Commission's argument on the ineffectiveness of state laws with its argument that only inconsistent state laws dislodge federal jurisdiction leads to illogical results. If a state's consistent laws are ineffective in the case of interstate transactions, so are its inconsistent laws. The consequence would be to attribute to Congress the purpose of rendering federal laws inapplicable where a state adopts statutes in conflict with federal policy even though those statutes may be ineffective to protect the public, but of providing for concurrent regulation as necessary to protect the public where the state and federal laws are consistent. Congress could not have intended any such result.

business is not regulated by State law." The Commission would have it read that the federal Act "shall be applicable to the business of insurance to the extent that such business is not [effectively] regulated by State law." There is no basis for any such construction in either the statute or its legislative history. The Senate debate quoted earlier herein (*supra*, pp. 20 to 21) shows that Senator Pepper criticized the proviso on the ground that it would render the federal Acts inapplicable even if state regulation were ineffective. Congress rejected this criticism and the Act was passed, demonstrating that Congress concluded on balancing all of the factors that state regulation of insurance is preferable to federal regulation.[14]

We turn now to the Commission's broad assertion that the states cannot effectively regulate the advertising here involved because it has moved in interstate commerce, an assertion which we vigorously deny. In the two cases at bar, both companies are licensed in every state in which they advertise and sell insurance. In the present posture of the cases, it is not disputed that each state has a statute which regulates the insurance advertising reaching its citizens. There can therefore be no question of the power of each state to reach the companies and enforce its laws.

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[14]

The Commission's construction of the proviso would in fact render it meaningless insofar as concerns the Federal Trade Commission Act. The Commission says that it has jurisdiction over all insurance transactions which are "in" interstate commerce, on the theory that the states cannot effectively regulate such interstate transactions (Pet. Br. 44-45). The Federal Trade Commission Act, however, applies only to practices "in" interstate commerce. Federal Trade Commission v. Bunte Bros., 312 US 349 (1941). Hence, if the Commission's position were sound, the McCarran Act would have no effect on Commission jurisdiction since the states could never effectively regulate the only conduct which the Commission has power to regulate.

Nor can there be any doubt that each state is fully capable of protecting its citizens against misleading advertising whether it comes from within or from without its borders.[15]

The Commission refers to due process limitations as exemplified by the line of cases beginning with *Allgeyer v. Louisiana*, 165 US 578 (1897), and points out that the McCarran Act did not remove these limitations (Pet. Br. 42, 46-47). At no time, however, has the due process clause in any way prevented a state from regulating transactions originating elsewhere but having consequences within its borders. Even at the time of *Allgeyer*, it was consistently held that a state could regulate a contract with a foreign insurance corporation if the contract was executed within the state. *Hooper v. California*, 155 US 648 (1895); *Nutting v. Massachusetts*, 183 US 553 (1902). And the more modern cases establish beyond doubt the power of a state consistent with the due process clause to regulate insurance transactions affecting its citizens even though interstate commerce is involved and even though the regulation may have extra-state repercussions. *Osborn v. Ozlin*, 310 US 53 (1940); *Hoopeston Canning Co. v. Cullen*, 318 US 313 (1943); *Robertson v. California*, 328 US 440 (1946); *Watson v.*

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[15]

The Commission raises questions as to whether the state of origin can constitutionally or efficaciously regulate advertising sent into other states (Pet. Br. 45-47). It also discusses the problem where a company is not licensed in a state in which policies are advertised and sold and says that the decisions below would preclude application of the federal Act there also (Pet. Br. 47-48). We do not discuss those questions because they are not before the Court. In both cases, the company is licensed and has agents in every state in which it does business. The reference to the holdings below is inaccurate. Both courts decided the cases on the facts before them, and indeed expressly limited their opinions to those facts (A.R. 116, N.R. 225).

Employers Liability Assurance Corp., 348 US 66 (1954); *McGee v. International Life Ins. Co.*, 78 S Ct 199 (1957).[16]

> "The Commission says that such state regulation of advertising originating elsewhere would reach only the symptom and not the source of the evil (Pet. Br. 47). This is wholly fallacious. Concoction of false advertising without dissemination is no evil that needs regulation. Under the system of state regulation, there can be control at the point of origin or dissemination as well as the point of delivery or reception, and thereby the evil is controlled and eliminated in its entirety. Actually, insofar as concerns a particular state, local regulation is more effective since state officials are closer to home and more receptive to complaints from the state's citizenry."

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[16]

The Commission refers to statements by Senators Ferguson and O'Mahoney that the McCarran Act would not permit a state to regulate "in the field of interstate commerce" (Pet. Br. 59-60, 61, 64). When read in context, however, it is obvious that the Senators were referring only to the question of a state's power to regulate for another state (91 Cong. Rec. 1483, 1484). Certainly they were not denying, and in fact could not deny, the power of a state to regulate transactions emanating from another state but having their consequences within the regulating state. In any event, we do not understand the Commission to deny that power here.

The Commission also points to a statement by Senator O'Mahoney that after the moratorium the federal Acts named in the proviso would "come to life again" (91 Cong. Rec. 1483). The Commission construes this to mean that after the moratorium the federal Acts would become "fully applicable" to insurance (Pet. Br. 60, 64). The statement is subject to no such construction. When read in context, it is clear that Senator O'Mahoney was referring only to the fact that after the moratorium these statutes would come to life to the extent that the states had not regulated. The Commission itself concedes that the federal Acts did not become "fully applicable" to insurance after the moratorium.

The main thrust of the Commission's entire argument is of course that federal regulation is more effective than state regulation. That question may be debated endlessly but is not in issue here. It was precisely the question before Congress when it considered the McCarran Act and was resolved in favor of the states. As this Court pointed out in *Prudential Insurance Co. v. Benjamin,* 328 US 408, 430-431 (1946), Congress had "full knowledge of the nation-wide existence of state systems of regulation" and "of the fact that they differ greatly in the scope and character of the regulations imposed"; hence it must be concluded that Congress "in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance, by the national public interest." We submit that to adopt the views of the Federal Trade Commission would turn aside this Congressional decision by means of strained constructions which do violence to the words and intent of Congress. The Commission's position, based on arguments as to the efficacy of state regulation versus federal regulation, if accepted, will result in the same conflicts and confusion that Congress undertook to resolve and eliminate by the adoption of the McCarran Act.

CONCLUSION

For the foregoing reasons, the judgments of the Courts below should be affirmed.

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April, 1958

RULES GOVERNING ADVERTISEMENTS OF ACCIDENT AND SICKNESS INSURANCE

WHEREAS the insurance laws of this State and particularly (refer to specific sections of law) prohibit the transmission of information in the form of advertisements or otherwise in such a manner or of such substance that the insurance buying public may be deceived or misled thereby; and

WHEREAS said insurance laws establish only general standards by which advertisements in the field of individual, group, blanket and franchise accident and sickness insurance should be prepared, disseminated and regulated; and,

WHEREAS it is considered proper and desirable to implement and interpret the general statutory standards and to adopt proper procedures to expedite enforcement thereof by this office; now therefore

IT IS ORDERED that the following standards for advertisements of such accident and sickness insurance as well as the administrative and enforcement procedures hereafter enumerated be and are hereby adopted as a formal and official rule (ruling) of this Department:

Section 1.

Definitions

A. **An advertisement** for the purpose of these rules shall include:

(1) printed and published material and descriptive literature of an insurer used in newspapers, magazines, radio and TV scripts, billboards and similar displays; and

(2) descriptive literature and sales aids of all kinds issued by an insurer for presentation to members of the public, including but not limited to circulars, leaflets, booklets, depictions, illustrations, and form letters; and

(3) prepared sales talks, presentations and material for use by agents and brokers, and representations made by agents and brokers in accordance therewith.

B. **Policy** for the purpose of these rules shall include any policy, plan, certificate, contract, agreement, statement of coverage, rider or endorsement which provides accident or sickness benefits, or medical, surgical or hospital expense benefits, whether on a cash indemnity, reimbursement, or service basis, except when issued in connection with another kind of insurance other than life, and except disability and double indemnity benefits included in life insurance and annuity contracts.

C. **Insurer** for the purpose of these rules shall include any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds, fraternal benefit society, and any other legal entity engaged in the advertisement of a policy as herein defined.

D. These rules shall also apply to agents and brokers to the extent that they are responsible for the advertisement of any policy.

Section 2.

Advertisements in General

Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases the meaning of which is clear only by implication or by familiarity with insurance terminology shall not be used.

Section 3.

Advertisements of benefits payable, losses covered or premiums payable

A. **Deceptive Words, Phrases or Illustrations**
Words, phrases or illustrations shall not be used in a manner which misleads or has the capacity and tendency to deceive as to the extent of any policy benefit payable, loss covered or premium payable. An advertisement relating to any policy benefit payable, loss covered or premium payable shall be sufficiently complete and clear as to avoid deception or the capacity and tendency to deceive.

Explanation:

(1) The words and phrases "all," "full," "complete," "comprehensive," "unlimited," "up to," "as high as," "this policy will pay your hospital and surgical bills" or "this policy will replace your income," or similar words and phrases shall not be used so as to exaggerate any benefit beyond the terms of the policy, but may be used only in such manner as fairly to describe such benefit.

(2) A policy covering only one disease or a list of specified diseases shall not be advertised so as to imply coverage beyond the terms of the policy. Synonymous terms shall not be used to refer to any disease so as to imply broader coverage than is the fact.

(3) The benefits of a policy which pays varying amounts for the same loss occurring under different conditions or which pays benefits only when a loss occurs under certain conditions shall not be advertised without disclosing the limited conditions under which the benefits referred to are provided by the policy.

(4) Phrases such as "this policy pays $1,800 for hospital room and board expenses" are incomplete without indicating the maximum daily benefit and the maximum time limit for hospital room and board expenses.

B. **Exceptions, Reductions and Limitations**

When an advertisement refers to any dollar amount, period of time for which any benefit is payable, cost of policy, or specific policy benefit or the loss for which

such benefit is payable, it shall also disclose those exceptions, reductions and limitations affecting the basic provisions of the policy without which the advertisement would have the capacity and tendency to mislead or deceive.

Explanation:

(1) The term "exception" shall mean any provision in a policy whereby coverage for a specified hazard is entirely eliminated; it is a statement of a risk not assumed under the policy.

(2) The term "reduction" shall mean any provision which reduces the amount of the benefit; a risk of loss is assumed but payment upon the occurrence of such loss is limited to some amount or period less than would be otherwise payable had such reduction clause not been used.

(3) The term "limitation" shall mean any provision which restricts coverage under the policy other than an exception or a reduction.

(4) **Waiting, Elimination, Probationary or Similar Periods**

When a policy contains a time period between the effective date of the policy and the effective date of coverage under the policy or a time period between the date a loss occurs and the date benefits begin to accrue for such loss, an advertisement covered by Section 3B shall disclose the existence of such periods.

(5) **Pre-existing Conditions**

(a) An advertisement covered by Section 3B shall disclose the extent to which any loss is not covered if the cause of such loss is traceable to a condition existing prior to the effective date of the policy.

(b) When a policy does not cover losses traceable to pre-existing conditions no advertisement of the policy shall state or imply that the applicant's physical condition or medical history will not affect the issuance of the policy or payment of a claim thereunder. This limits the use of the phrase "no medical examination required" and phrases of similar import.

Section 4.

Necessity for disclosing policy provisions relating to renewability, cancellability and termination

An advertisement which refers to renewability, cancellability or termination of a policy, or which refers to a policy benefit, or which states or illustrates time or age in connection with eligibility of applicants or continuation of the policy, shall disclose the provisions relating to renewability, cancellability and termination and any modification of benefits, losses covered or premiums because of age or for other reasons, in a manner which shall not minimize or render obscure the qualifying conditions.

Section 5.

Method of disclosure of required information

All information required to be disclosed by these rules shall be set out conspicuously and in close conjunction with the statements to which such information relates or under appropriate captions of such prominence that it shall not be minimized, rendered obscure or presented in an ambiguous fashion or intermingled with the context of the advertisement so as to be confusing or misleading.

Section 6.

Testimonials

Testimonials used in advertisements must be genuine, represent the current opinion of the author, be applicable to the policy advertised and be accurately reproduced. The insurer, in using a testimonial, makes as its own all of the statements contained therein, and the advertisement including such statements is subject to all of the provisions of these rules.

Section 7.

Use of Statistics

An advertisement relating to the dollar amounts of claims paid, the number of persons insured, or similar statistical information relating to any insurer or policy shall not be used unless it accurately reflects all of the relevant facts. Such an advertisement shall not imply that such statistics are derived from the policy advertised unless such is the fact.

Section 8.

Inspection of Policy

An offer in an advertisement of free inspection of a poli or offer of a premium refund is not a cure for misleading or deceptive statements contained in such advertisement.

Section 9.

Identification of plan or number of policies

A. When a choice of the amount of benefits is referred to, an advertisement shall disclose that the amount of benefits provided depends upon the plan selected and that the premium will vary with the amount of the benefits.

B. When an advertisement refers to various benefits which may be contained in two or more policies, other than group master policies, the advertisement shall disclose that such benefits are provided only through a combination of such policies.

Section 10.

Disparaging Comparisons and Statements

An advertisement shall not directly or indirectly make unfair or incomplete comparisons of policies or benefits or otherwise falsely disparage competitors, their policies, services or business methods.

Section 11.

Jurisdictional Licensing

A. An advertisement which is intended to be seen or heard beyond the limits of the jurisdiction in which the insurer is licensed shall not imply licensing beyond those limits.

Section 12.

Identity of Insurer

The identity of the insurer shall be made clear in all of its advertisements. An advertisement shall not use a trade name, service mark, slogan, symbol or other device which has the capacity and tendency to mislead or deceive as to the true identity of the insurer.

Section 13.

Group or Quasi-group Implications

An advertisement of a particular policy shall not state or imply that prospective policyholders become group or quasi-group members and as such enjoy special rates or underwriting privileges, unless such is the fact.

Section 14.

Introductory, initial or special offers

An advertisement shall not state or imply that a particular policy or combination of policies is an introductory, initial or special offer and that the applicant will receive advantages by accepting the offer, unless such is the fact.

Section 15.

Approval or endorsement by third parties

A. An advertisement shall not state or imply that an insurer or a policy has been approved or an insurer's financial condition has been examined and found to be satisfactory by a governmental agency, unless such is the fact.

B. An advertisement shall not state or imply that an insurer or a policy has been approved or endorsed by any individual, group of individuals, society, association or other organization, unless such is the fact.

Section 16.

Service Facilities

An advertisement shall not contain untrue statements with respect to the time within which claims are paid or statements which imply that claim settlements will be liberal or generous beyond the terms of the policy.

Section 17.

Statements about an insurer

An advertisement shall not contain statements which are untrue in fact or by implication misleading with respect to the insurer's assets, corporate structure, financial standing, age or relative position in the insurance business.

Special Enforcement Procedures for Rules Governing the Advertisement of Accident and Sickness Insurance

(1) **Advertising File**: Each insurer shall maintain at its home or principal office a complete file containing every printed, published or prepared advertisement of individual policies and typical printed, published or prepared advertisements of blanket, franchise and group policies hereafter disseminated in this or any other state whether or not licensed in such other state, with a notation attached to each such advertisement which shall indicate the manner and extent of distribution and the form number of any policy advertised. Such file shall be subject to regular and periodical inspection by this Department. All such advertisements shall be maintained in said file for a period of not less than three years.

(2) **Certificate of Compliance**: Each insurer required to file an annual statement which is now or which hereafter becomes subject to the provisions of this rule (ruling) must file with this Department together with its annual statement, a certificate executed by an authorized officer of the insurer wherein it is stated that to the best of his knowledge, information and belief the advertisements which were disseminated by the insurer during the preceding statement year complied or were made to comply in all respects with the provisions (of the insurance laws of this State as implemented and interpreted by this rule—ruling) (of this rule—ruling). It is requested that the chief executive officer of each such insurer to which this rule

(ruling) is addressed acknowledge its receipt and indicate its intention to comply therewith.

Effective date of this rule (ruling) 90 days from date hereof.
Dated this ..... day of ....., 1955.

Signature .....

Adopted by the National Association of Insurance Commissioners on December 1, 1955, and amended December 3, 1956.

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Nos. 435 and 436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

NATIONAL CASUALTY COMPANY

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS.

BRIEF FOR THE AMERICAN MUTUAL INSURANCE ALLIANCE, AMICUS CURIAE.

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THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS.

BRIEF OF THE AMERICAN MUTUAL INSURANCE ALLIANCE AS AMICUS CURIAE.

STATEMENT OF INTEREST AND POSITION.

The American Mutual Insurance Alliance is a trade association of 107 advance premium mutual fire and casualty insurance companies. Its offices are located at 20 North Wacker Drive, Chicago 6, Illinois.

Included in the membership of the American Mutual Insurance Alliance are companies which write all kinds of fire and casualty insurance, including accident and health. All are deeply concerned over the assertion by the Federal Trade Commission of jurisdiction over accident and health insurance advertising.

Upholding of this claim of jurisdiction would permit a federal agency to intrude upon a field of regulation which has heretofore been occupied by the states. This intrusion would occur in the face of a federal statute which was enacted for the specifically stated purpose of continuing state regulation (Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 70 Stat. 908, 15 U. S. C. 1011-1015, herein referred to as the McCarran Act).

Continuation of state regulation of insurance is of vital importance to the American Mutual Insurance Alliance. Following the holding in June 1944 by this Court, in *United States* v. *South-Eastern Underwriters Association,* that insurance was interstate commerce, the National Association of Insurance Commissioners consulted with insurance industry representatives as to means by which state regulation could be preserved. As a result of these deliberations, in November 1944 the N. A. I. C. submitted a legislative proposal to the Congress of the United States which became the basis of the McCarran Act. Consultation with members of Congress was had by the N. A. I. C. and industry representatives before that time and was continued until the McCarran Act became law on March 9, 1945.

The present General Manager of the Alliance, Newell R. Johnson, was Commissioner of Insurance of Minnesota and president of the National Association of Insurance Commissioners during the period in question. The late A. V. Gruhn, then General Manager of the Alliance, was among the industry representatives who consulted with the N. A. I. C. and with members of Congress. He was also a moving

spirit of the All-Industry Committee, established on recommendation of the N. A. I. C. to implement the McCarran Act by means of state legislation.

The attorneys filing this brief, *amicus curiae* are members of the Legal Committee of the Alliance, and are all executive officers or general counsel of their respective insurance companies, which in turn are members of the American Mutual Insurance Alliance. Among these attorneys are several who represented the Alliance on the All-Industry Committee, mentioned above.

The American Mutual Insurance Alliance has an interest in the question of whether the McCarran Act removes from the scope of the federal anti-trust laws such insurance activities as are regulated by state law. With respect to the instant cases, the interest of the Alliance is twofold: 1) To urge this Court that the Federal Trade Commission be held to be without jurisdiction. On this point the Alliance adopts the arguments contained in a consolidated *amicus curiae* brief being filed on behalf of other insurance associations. 2) To point out that upholding Federal Trade Commission jurisdiction in these cases would open the way to application of the Sherman Act to insurance rating activities which are regulated by state law. The latter point is argued in this brief because of its particular interest to the Alliance and the companies which comprise it, since the latter are customarily members or subscribers of fire and casualty rating bureaus. Life, accident and health insurance rates, on the other hand, are not developed through rating bureaus.

STATEMENT OF QUESTION.

The question presented by these cases is whether the jurisdiction asserted by the Federal Trade Commission over the advertising of the National Casualty Company and The American Hospital and Life Insurance Company exists in the face of the McCarran Act and in the face of state laws which regulate such advertising.

SUMMARY OF ARGUMENT.

In passing the McCarran Act, Congress had two purposes which are pertinent here. First, to express its desire that the states regulate the business of insurance, free of Commerce Clause limitations. Second, to express its intent that if laws regulating insurance were enacted by the states, such laws should oust the otherwise applicable enumerated statutes (with certain exceptions not relevant here), and to consent to such ouster.

The desire for state regulation of insurance and the intent to preclude federal jurisdiction over insurance activities as to which the states have specifically legislated are apparent from the general structure and language of the McCarran Act. Similarly, the legislative history of the McCarran Act shows that Congress intended that Federal Trade Commission jurisdiction should exist only in the absence of state regulation.

If a particular activity in the insurance business is regulated by state law, inquiry into whether such law is "consistent" or "inconsistent" with the federal statute is neither required nor permitted by the McCarran Act.

Existence of state law regulating an activity of itself excludes the Federal Trade Commission from jurisdiction over the activity.

Similarly, the McCarran Act permits of no distinction between the Federal Trade Commission Act and other federal anti-trust laws as regards their application to insurance activities which are regulated by state law. Specifically, if the Federal Trade Commission Act is held applicable to insurance advertising which is also regulated by state law, the Sherman Act may be held applicable to insurance rating practices, despite state rate regulatory laws. This would not only nullify a vast body of state law but also frustrate the will of Congress, expressed through passage of the McCarran Act, that the power to regulate the business of insurance be restored and preserved to the states and that the exercise of such power should oust the otherwise applicable federal acts.

ARGUMENT

I. The Purpose of Congress, in Passage of the McCarran Act, Was to Empower the States to Regulate the Business of Insurance to the Exclusion of the Federal Trade Commission.

In *Paul* v. *Virginia*, 8 Wall. 168 (1869), and consistently thereafter until 1944, this Court held that insurance was not commerce. Not being commerce, it could not be interstate commerce, and was not subject, therefore, to regulation by the federal government under the Commerce Clause of the Constitution. This left regulation of the business of insurance solely to the states.

During the seventy-five years following *Paul* v. *Virginia* all of the states developed systems of taxation and regulation of insurance company operations. Administration of these state laws was vested in a state official most commonly termed "insurance commissioner." These administering officers in turn made up the membership of the National Association of Insurance Commissioners, established in 1871 to study state and interstate insurance problems and to recommend practicable measures to the states.

On June 5, 1944, this Court held that insurance was commerce and, when crossing state lines, interstate commerce. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533.

There were two consequences of the *S.E.U.A.* decision which caused particular concern to the states, the insurance industry and Congress. First, the possession by Congress of exclusive power to regulate interstate commerce threatened the validity of existing state laws taxing

insurance companies, from which large revenues were derived by the states. Second, the *S.E.U.A.* case was an anti-trust suit. By holding the insurance business subject to the Sherman Act, a direct conflict was created with practices long authorized, and sometimes required, by state law. For example, the laws of some states permitted or required insurance companies to fix rates, on the basis of pooled experience, by acting in concert through rating bureaus supervised by the states.

The making of rates by insurance rating bureaus and the use of pooled experience as a basis for such rates is highly desirable. In contrast to the seller of a commodity, who knows, or can ascertain, the exact price of his product, the largest element in an insurance rate—the loss factor—is not known in advance. It can only be estimated on the basis of an average of what that particular coverage has cost in the past. An old and very large company, if it has kept elaborate records and has been writing the particular coverage for a considerable period, may be able to do a fairly accurate job on its own. But if the company is young or small, or its records are not extensive, it may arrive at a wrong rate. If that rate is too high, it will not sell much business and those who do buy from it will have paid too much. If the rate is too low and much business is sold, insolvency of the company is apt to result and those who bought the insurance may face catastrophe.

The best way to make proper insurance rates, therefore, is to combine the experience of many insurers. The broader the base, the more accurate the result. Under the Sherman Act, however, collaborative action of the type generally regarded as necessary for sound insurance rate making would be regarded as illegal price fixing.

The National Association of Insurance Commissioners and the industry were in agreement that an effort should be made to strengthen and preserve state regulation of

insurance. Able lawyers were included in the membership of the N. A. I. C., and the industry placed further expert help at its disposal. As a result the National Association of Insurance Commissioners presented to the Congress of the United States a legislative proposal in November of 1944. This proposal became the basis of the bill (S. 340) which on March 9, 1945 became Public Law 15, 79th Congress, known as the McCarran Act.

The legislative proposal submitted to Congress by the Executive Committee of the National Association of Insurance Commissioners shows clearly that their aim was to restore the regulation of insurance to the states. For example, the "Declaration of Policy" section of the Memorandum of Explanation of the N. A. I. C. legislative proposal stated:

> The National Association of Insurance Commissioners sincerely believes that the states can adequately regulate the insurance business, and because of legal considerations and the close proximity of state supervisory officials to the people affected, are in a better position to regulate that business than the Federal Government. In that regard it has regulatory machinery available, including regulatory statutes and trained personnel. It is our understanding that Congress shares this belief. It is therefore regarded as essential that Congress should declare its policy and its will.

The Memorandum subsequently dealt specifically with Federal Trade Commission jurisdiction as follows:

> It is quite obvious that if the regulation of the insurance business is to continue in the several states, that any possible application of the Federal Trade Commission Act to that business should be excluded; this, if for no other reason than that the states can satisfactorily perform the functions which the Commission might be called upon or elect to exercise.*

* See N. A. I. C. Proc. 1945, pp. 34-40, for full text of the Memorandum.

Similarly, the August 29, 1944 report of the Subcommittee on Federal Legislation to the Executive Committee of the National Association of Insurance Commissioners, later incorporated in the legislative proposal of the N. A. I. C., stated:

> The several states are empowered to deal with improper practices. To permit the Federal Trade Commission to exercise the same power would mean either duplication or overlapping of the same functions. Furthermore, in view of the present trend to expand the area of what constitutes interstate commerce the Federal Trade Commission might well preempt this field to the exclusion of the states. The public interest requires that wherever possible the functions of government be exercised by that unit of government closest to the people. In this instance it is manifest that the insurance departments of the various states are far closer to the problem and better able to serve than a detached central bureau.*

It is evident that Congress was urged by the industry and the National Association of Insurance Commissioners to restore to the states full authority to regulate the business of insurance which the *South-Eastern Underwriters* decision had taken away. It also is clear that Congress, in enacting the McCarran Act, which followed in substance the N. A. I. C. legislative proposal, believed it was returning the regulation of insurance to the states and effectively consenting to such regulation, free from Commerce Clause limitations. Congress also expressed its intent that state regulatory laws should oust corresponding federal statutes. This intent is implicit in the enactment of the McCarran Act, because of its background; it is clearly evidenced by many passages from the debate on the measure in Congress, and it is clearly stated in the act itself.

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* See N. A. I. C. Proc. 1945, pp. 23-31, for full text of the report.

II. The Language and General Structure of the McCarran Act Specifically Preclude the Assertion by the Federal Trade Commission of Jurisdiction Over Insurance Activities as to Which the States Have Legislated.

Argument on the above point is included as Point I in the consolidated *amicus curiae* brief being filed with this Court in these cases for the Life Insurance Association of America, the American Life Convention and the Health Insurance Association of America (hereinafter called the "consolidated *amicus* brief").

The argument under Point I of the consolidated *amicus* brief is hereby adopted.

III. The Legislative History of the McCarran Act Shows That Congress Intended That Federal Trade Commission Jurisdiction Should Exist Only in the Absence of State Legislation.

Argument on the above point is set out under Point II of the consolidated *amicus* brief. That argument is hereby adopted.

IV. The Arguments and Authorities Relied Upon by the Commission Do Not Support the Suggestion That Congress Intended That the McCarran Act Should Oust Federal Trade Commission Jurisdiction Only in the Event of "Inconsistent" State Legislation.

Argument on the above point is set out under Point III of the consolidated *amicus* brief. That argument is hereby adopted.

V. No Distinction Is Permitted, Under the McCarran Act, Between the Federal Trade Commission Act and Other Federal Anti-Trust Laws as Regards Application to Insurance Activities Which Are Regulated by State Law.

As stated in Point I of this brief, it was recognized immediately after the *South-Eastern Underwriters* decision that there was a direct conflict between existing state laws and practices, particularly as to insurance rate making, and the Sherman Act. What was required, authorized or permitted under state law would constitute illegal price-fixing under the Sherman Act.

The foregoing is illustrated by the report of the Subcommittee on Federal Legislation to the Executive Committee of the National Association of Insurance Commissioners, previously referred to. Pertinent excerpts are set out below.

> One of the immediate effects of this decision [S. E. U. A.] was to make applicable to the insurance business a series of federal acts which will be, in many instances, in direct conflict with the provisions of state laws.
>
> * * * Moreover, companies, boards, officers and employees, relying upon what they regarded as the established law of the land, may have become overnight subject to criminal liability—all in the absence of an act of Congress specifically regulating the insurance business.
>
> * * * * *
>
> The objective of the anti-trust acts is that competition shall be free and unfettered. The courts have said that agreements to fix prices, no matter how benevolent or well intentioned, are illegal *per se*. Experience has demonstrated that unrestricted competition in the insurance business is not in the public interest. Practically every state in the Union has

> upon its statute book provisions prohibiting unfair discrimination in rates. If unfair discrimination is to be avoided, there must be reasonable uniformity in the rates. Such uniformity can be obtained only by cooperation in obtaining statistical data and in the promulgation of rates based thereon. This result can be obtained only through concert of action.
>
> • • • • •
>
> For these and other reasons this sub-committee believes it would be a mistake to permit or require the unrestricted competition contemplated by the anti-trust laws to apply to the insurance business. To prohibit combined efforts for statistical and rate-making purposes would be a backward step in the development of a progressive business. We do not regard it as necessary to labor this point any further because Congress itself recently recognized the necessity for concert of action in the collection of statistical data and rate making when it enacted the District of Columbia fire insurance rating act.

Thus it will be seen that Congress, when passing the McCarran Act, was fully aware that state rate regulatory laws were in conflict with the Sherman Act. It was obviously with the purpose of resolving this conflict in favor of state regulation that Congress exempted the business of insurance from application of the Sherman Act to the extent that such business is regulated by state law.

That the Sherman Act is ousted by state rate regulatory laws has been recognized by the courts. It was so held in *North Little Rock Transportation Company* v. *Casualty Reciprocal Exchange*, 181 F. 2d 174 (8th Cir., 1950), on which writ of certiorari was denied by this Court, 340 U. S. 823 (1950). This fact is also conceded in the brief for the Federal Trade Commission. What counsel for the Commission fail to recognize is that there is absolutely nothing in the McCarran Act which permits of any distinction or difference in the application of the Sherman

Act and the Federal Trade Commission Act to insurance activities which are regulated by state law.

The Sherman Act and the Federal Trade Commission Act are referred to in Sections 2(b) and 3(a) of the McCarran Act. In each instance they are included in an enumeration of the federal acts known as the anti-trust laws, and both are on precisely the same footing. Only in Section 3(b) are the two acts treated differently, and then it is the Sherman Act, *not* the Federal Trade Commission Act, which is singled out for special treatment.*

As shown, no distinction is made or permitted to be made under Section 2(b) of the McCarran Act as between the Sherman Act and the Federal Trade Commission Act. Therefore, if the Federal Trade Commission Act applies to insurance activities which are regulated by state law, as contended by counsel for the Commission, the same construction can be applied with respect to the Sherman Act.

On the premise that the McCarran Act gave the states the power to make the Sherman Act inapplicable to rating activities regulated by state law, the state insurance commissioners and the insurance industry supported the enactment of model rate regulatory statutes for fire and casualty insurance. These model bills were passed, or existing laws were amended to provide additional regulatory features, by the legislatures of all states. The state insurance commissioners, the fire and casualty insurance companies, and the rate making and rate advisory organizations throughout the country have been operating for more than ten years in accordance with these state rate regulatory laws.

If the Commission prevails and the Federal Trade Com-

* Section 3(b) provides that nothing contained in the McCarran Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or any act of boycott, coercion or intimidation.

mission Act is held applicable to insurance advertising which is regulated by state law, then the Sherman Act similarly could be held applicable to rating activities which are also regulated by state law. The state rate regulatory laws are not "self-executing," as claimed in the brief of counsel for the Commission (page 53), and therefore are not distinguishable on such grounds from statutes prohibiting false advertising or other unfair or deceptive acts or practices.

If the Sherman Act applies to insurance rating activities which are regulated by state law, a vast body of state legislation will be made a nullity. In addition, the states and the business of insurance will be plunged back into the uncertainties and difficulties with they were faced following the *South-Eastern Underwriters* decision, and from which the McCarran Act was designed to rescue them.

Under the theory of counsel for the Commission, carried to its logical conclusion, the McCarran Act accomplished nothing. This is in direct conflict with the principle of statutory construction under which a legislative body is not to be presumed to have done a vain thing in the enactment of a statute. Furthermore, such an interpretation cannot be justified under the historical events which led to the enactment of the McCarran Act, the plain language of the statute itself or the meaning ascribed to it by this Court.

VI. Insurance Advertising Is "Regulated by State Law" When States Adopt Comprehensive Regulatory Statutes Specifically Dealing With the Subject.

Argument on the above point is set out under Point IV of the consolidated *amicus* brief. That argument is hereby adopted.

VII. Exclusive State Regulation of Insurance Advertising Does Not Result in a "Regulatory No-Man's Land."

Argument on the above point is set out under Point V of the consolidated *amicus* brief. That argument is hereby adopted.

Conclusion.

For the foregoing reasons, we believe the Federal Trade Commission to be without jurisdiction in the instant cases. We therefore respectfully urge that the judgments of the Courts of Appeals be affirmed.

Respectfully submitted,

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Nos. 435 and 436

Supreme Court of the United States

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION, *Petitioner*

v.

NATIONAL CASUALTY COMPANY

No. 436

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND FIFTH CIRCUITS

BRIEF FOR LIFE INSURANCE ASSOCIATION OF AMERICA, AMERICAN LIFE CONVENTION, AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION, *Petitioner*

v.

NATIONAL CASUALTY COMPANY

No. 436

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND FIFTH CIRCUITS

BRIEF FOR LIFE INSURANCE ASSOCIATION OF AMERICA, AMERICAN LIFE CONVENTION, AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE

STATEMENT OF INTEREST

The Life Insurance Association of America, the American Life Convention, and the Health Insurance Association of America are associations with a combined membership of 416 insurance companies. These

companies have in force approximately 96 percent of the legal reserve life insurance and 80 percent of the accident and health insurance in the United States. In connection with the sale of insurance these companies circulate advertising throughout the United States.

The question presented in these cases is whether the Federal Trade Commission may regulate the advertising of insurance in States where that advertising is regulated by State law. The petitioner contends for a system of dual regulation which, under statutes couched in broad terms and enforceable initially by administrative agencies, would lead inevitably to conflicts, would be burdensome and confusing both to the insurance industry and to the regulatory agencies involved, and would be directly contrary to the expressed will of Congress.

It is therefore of vital interest to the members of the above-named associations that the judgments of the Courts of Appeals in these cases be affirmed by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit in No. 435 (N.R. 216-225)[1] is reported at 245 F. 2d 883. The opinion of the Court of Appeals for the Fifth Circuit in No. 436 (A.R. 110-117) is reported at 243 F. 2d 719. The opinions of the Federal Trade Commission in No. 435 (N.R. 204-210) and in No. 436 (A.R. 68-108) are not yet reported.

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[1] We adopt the petitioner's use of the designation "N.R." to refer to the printed record in No. 435, Federal Trade Commission v. National Casualty Co., and the designation "A.R." to refer to the printed record in No. 436, Federal Trade Commission v. The American Hospital and Life Ins. Co.

JURISDICTION

The judgment of the Court of Appeals in No. 435 was entered on June 6, 1957 (N.R. 216). The judgment of the Court of Appeals in No. 436 was entered on April 9, 1957 (A.R. 117-118). The petitions for writs of certiorari were filed on September 6, 1957, and were granted on November 12, 1957 (355 U. S. 867). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Courts of Appeals for the Sixth and Fifth Circuits decided unanimously that the provisions of the Act of March 9, 1945, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015, and particularly the proviso to Section 2(b) of that Act, deprive the Federal Trade Commission of jurisdiction to regulate the health and accident insurance advertising of the National Casualty Company and The American Hospital and Life Insurance Company, respectively, in those States where that advertising is regulated by State law.

The question presented is whether these decisions are correct.

STATUTE INVOLVED

The Act of March 9, 1945, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015 (hereafter referred to as the McCarran Act) provides:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to

impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3.(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor

Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"Sec. 5. As used in this Act, the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

"Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

STATEMENT OF THE CASES

The Decisions of the Examiners and the Commission

No. 435

The National Casualty Company (hereafter referred to as "National") is a Michigan corporation engaged in the health and accident insurance business in all of the forty-eight States and in the District of Columbia and Hawaii. It is licensed in each of the States in which it does business. Its business is conducted through locally licensed agents in each of the States in which the Company is licensed (N.R. 32, 188).

National sends printed brochures from its home office in Detroit, Michigan, to its agents in other States, which the agents display or distribute to prospective policy holders for the purpose of soliciting health and accident insurance business. National also sends brochures from its home office directly to prospective policy holders for the same purpose. Less than five percent of the total number of brochures used by National are sent directly to prospective policy holders (N.R. 188). These are the only types of advertising as to

which findings were made by the Commission (N.R. 204). Applications for policies secured by National's agents in States other than Michigan are normally mailed to National's home office, where the policies are issued and mailed to the agents for delivery to the new policy holders. A small number of National's agents have the authority to issue policies themselves, subject to subsequent approval by the home office (N.R. 189).

The Federal Trade Commission, purporting to act pursuant to the provisions of the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15, U. S. C. §§ 41-58, issued a complaint charging that National's brochures contained false, misleading, and deceptive representations (N.R. 2-11). National contended that because of the provisions of the McCarran Act the Commission had no jurisdiction of the subject matter of the complaint (N.R. 11-14).

The Examiner agreed that the Commission had no jurisdiction where there was State regulation (N.R. 201). He found, however, that in four States and in the District of Columbia there was no State legislation regulating health and accident insurance advertising (N.R. 200). The Examiner also held that the five percent of National's brochures which are sent directly from the Company's home office to prospective purchasers in the States in which National is licensed could not be regulated by State law (N.R. 201).[2] The

[2] This brief will not attempt to discuss the Examiner's view that health and accident insurance advertising is in fact unregulated in a small number of States, and that the States are powerless to regulate advertising sent directly to prospective policy purchasers through the mails. The majority of the Commission did not rest their decision upon these grounds, but rather took

Examiner therefore sustained Commission jurisdiction to a limited extent. The Commission, in a three-to-two decision, overruled the Examiner insofar as his decision placed limits on Commission jurisdiction, and relying on its earlier majority opinion in *The American Hospital and Life Ins. Co.* (A.R. 68-87), held that the Commission had jurisdiction over all of National's advertising despite the provisions of the McCarran Act and irrespective of the existence of State regulation (N.R. 204-210). The Commission issued an order requiring the Company to cease and desist from making certain representations in its advertising (N.R. 210-213).

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the sweeping view that the existence of State regulation is irrelevant to Commission jurisdiction.

It should be pointed out, however, that Mississippi, one of the States classified by the Examiner as not regulating health and accident insurance advertising, adopted a comprehensive statute regulating insurance advertising subsequent to the report of the Examiner but prior to the decision of the Commission. Miss. Code Ann., §§ 5649-01 to -12. In the District of Columbia, also so classified, a statute specifically prohibiting the false advertising of health and accident insurance recently became effective. Pub. L. No. 334, 85th Cong., 2d Sess. (Feb. 22, 1958). Each of the other States referred to by the Examiner has, as part of its statute law, provisions regulating false and misleading advertising generally. See Vernon's Mo. Stat. Ann., tit. 24, § 561.660; Mont. Rev. Code, 1947, tit. 40, § 94-1819; R.I. Gen. Laws, 1957, Vol. 3, § 11-18-10.

That the use of the mails cannot insulate from State control activities unlawful under State law has long been clearly established. See, *e.g.*, Travelers Health Ass'n v. Virginia, 188 Va. 877, 51 S. E. 2d 263, affirmed on other grounds, 339 U. S. 643; West Virginia v. Adams Express Co., 219 Fed. 794; *cf.* McGee v. International Life Ins. Co., 355 U. S. 220. In United States v. Sylvanus, 192 F. 2d 96 (C.C.A. 7), certiorari denied, 342 U. S. 943, the sole case relied on by the Examiner to support his novel conclusion, the court expressly recognized that the transaction there involved, consummated through the mails, was regulable by the State. See 192 F. 2d at 100.

No. 436

The American Hospital and Life Insurance Company (hereafter referred to as "American") is a Texas corporation engaged in the health and accident insurance business in Texas and in thirteen other States. It is licensed in each of the States in which it disseminates advertising in connection with its business (A.R. 69). Its business is conducted through locally licensed agents in each of the States in which the Company is licensed (*Ibid.*).

American sends printed brochures from its home office in San Antonio, Texas, to its agents in other States which the agents display or distribute to prospective policy holders for the purpose of soliciting health and accident insurance business. This is the only type of advertising in which American engages. Applications for policies secured by American's agents in States other than Texas are mailed to American's home office, where the policies are issued and mailed to the agents for delivery to the new policy holders (*Ibid.*). In each of the States into which American sends its brochures State statutes forbid the use of misleading and false representations in the sale of insurance.

The Federal Trade Commission, purporting to act pursuant to the provisions of the Federal Trade Commission Act, issued a complaint charging that American's brochures contained false, misleading, and deceptive representations (A.R. 5-12). American contended that because of the provisions of the McCarran Act the Commission had no jurisdiction of the subject matter of the complaint (A.R. 12-22). The Examiner agreed that the Commission had no jurisdic-

tion where there was State regulation (A.R. 33).[3] The Commission, in a three-to-two decision, rejected this contention, held that it had jurisdiction despite the existence of State regulation, and issued an order requiring the Company to cease and desist from making certain representations in the brochures that are sent from Texas into other States and used there to solicit business (A.R. 60-68).

The Decisions of the Courts of Appeals

After the Federal Trade Commission issued its orders, National and American petitioned for review in the Courts of Appeals for the Sixth and Fifth Circuits, respectively. In each case the Court of Appeals unanimously held that the Federal Trade Commission was without jurisdiction over the advertising practices of the petitioner in States where these advertising practices were regulated by State law. The Court of Appeals for the Fifth Circuit set aside the Commission's order against American without remand (A.R. 117-118). The Court of Appeals for the Sixth Circuit set aside the Commission's order against National, and remanded the cause to the Commission for further proceedings not inconsistent with its opinion (N.R. 216).

SUMMARY OF ARGUMENT

I

The language of the McCarran Act makes it plain that the Federal Trade Commission Act does not apply

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[3] The Examiner found that each of the States in which American disseminates advertising except Mississippi had legislation comprehensively regulating American's advertising (A.R. 33-37). Mississippi adopted such a statute prior to the decision of the Commission. See note 2, *supra*.

to insurance activities that are covered by State legislation. The provisions of Section 2 of the statute, and particularly the words of the proviso to subsection (b) of that section, are decisive on this point.

The words of the proviso precisely define "the extent" to which the Federal Trade Commission Act is to apply to the business of insurance; the operative and controlling words are "to the extent that such business is not regulated by State law". The "extent" is thus explicitly stated in terms of the absence of "State law". These words plainly mean that the Federal Trade Commission Act is not to apply to any aspect of the business of insurance that is covered by a State regulatory statute.

Both the words and the structure of the statute are inconsistent with the interpretation that petitioner now advances. Given their ordinary meaning the words of the proviso to Section 2(b) do not, as petitioner contends, provide for a condition of general concurrent jurisdiction, under which the Federal Trade Commission Act would continue to apply to the advertising of any particular insurance company unless a State formally and explicitly sanctioned that advertising by legislation or after formal hearing.

If, as petitioner contends, the Act was intended to provide for concurrent jurisdiction, with State supremacy in the event of conflict, the proviso to Section 2(b) would have been unnecessary, since it would have added nothing to the meaning of the opening clause of the subsection. Petitioner's argument, therefore, requires the Court to read the proviso as simply a repetition of the opening clause and as unnecessary and meaningless. The Federal Trade Commission it-

self in its opinion recognized the indefensibility of this construction and expressly repudiated it.

There is no merit in petitioner's suggestion that conduct covered by a State statute is not "regulated" until the State statute is formally enforced against or applied to the particular conduct in a way that conflicts with Federal Trade Commission regulation. The words of the proviso—"regulated by State law"—are clearly directed to the existence of State legislation covering insurance activities; the words do not connote or suggest that the operation of the proviso depends upon the actual application of a State statute in a particular proceeding, much less upon its being applied so as to produce a particular kind of result. The elaborate and artificial distinctions which petitioner attempts to read into the plain language of the proviso to Section 2(b) are unjustified by the words of the proviso and are inconsistent with the fact, conceded by petitioner, that Congress in passing the McCarran Act intended that State rather than Federal policies should control in the regulation of the insurance business.

II

The legislative history confirms the plain meaning of the words of the statute and shows that the Federal Trade Commission Act is not to apply to the business of insurance to the extent that the business is regulated by State law.

The proviso to Section 2(b) was first added to the bill in the conference that took place between the two houses. There is no comment upon it either in the Conference Report nor in the statement that accom-

panied the report, and it was not debated in the House of Representatives. In the Senate, however, a considerable debate took place regarding the proviso prior to approval of the Conference Report.

In the course of this debate Senators McCarran and Ferguson, two of the conferees on behalf of the Senate, made it perfectly plain that the statutory intent was that once the States had enacted regulatory legislation dealing with the same subject matter as that covered by the three Federal statutes enumerated in the proviso, the application of those three Acts should cease *in toto*. The debates flatly contradict petitioner's suggestions that Congress intended a distinction between the effect of State legislation "consistent" with and State legislation "inconsistent" with the enumerated Federal statutes, or a distinction between State regulatory "legislation" and State "enforcement".

III

Each of petitioner's arguments appears to depend upon the assertion that in the present cases there is no conceivable conflict between State and Federal policy. Counsel urge that only in cases where an open and immediately apparent conflict is presented should the McCarran Act be read as ousting Federal Trade Commission jurisdiction.

The difficulty with this assertion is that it fails to take account of the words of the statute but instead addresses itself to a hypothetical legislative problem. Before *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, the subject matter covered by the three Federal statutes named in the proviso had been subject to exclusive State regulation; it is therefore not surprising that Congress saw fit to return to the

States a measure of the exclusive jurisdiction which they had long possessed.

The analogies asserted by the petitioner between the McCarran Act and the Twenty-first Amendment and Federal Power Act are defective. There is no language in the Twenty-first Amendment that even remotely resembles the language of the proviso to Section 2(b) of the McCarran Act. The Federal Power Act and the McCarran Act are based on wholly different premises, the former accepting the limits on State power imposed by the Commerce Clause and the latter altogether removing those limits. Indeed, petitioner makes no contention that the McCarran Act confirms the supremacy of Federal law and imposes exclusive Federal jurisdiction over broad regulatory areas, as the Federal Power Act has been held to do.

IV

The proviso to Section 2(b) of the McCarran Act states that the Federal Trade Commission Act shall not apply to the business of insurance to the extent that that business is regulated by State law. Counsel for the Commission urge that whereas conduct authorized by permissive State statutes may properly be said to be "regulated by State law", conduct outlawed by prohibitory State statutes "general in scope" and providing for administrative enforcement is not so regulated until the administrative enforcement has actually taken place.

There is nothing in the words of the McCarran Act or in its legislative history which lends support to this strained interpretation. It appears to be based largely upon a misconception of the nature of State statutory standards in the area of insurance advertis-

ing and disregards the great likelihood of actual conflict between State and Federal regulatory authority if only formal affirmative action by the former can serve to oust the jurisdiction of the latter. Petitioner's argument ignores the fact that proper State administration may involve a considered determination that formal affirmative action is unnecessary.

Like the Federal Trade Commission Act, the Model State Fair Trade Practices Act for insurance, already adopted by 41 States, provides for no procedure whereby insurance companies may tender advertising for administrative scrutiny and approval before its dissemination. In these circumstances the fact that the records in these cases do not disclose formal action by State agencies directed to the advertising here in question does not establish State dereliction or lack of diligence. Petitioner's assumption that no conflict is possible in the administration of Federal and State legislation under the system of concurrent jurisdiction for which it contends is the negation of the flexibility of the administrative process.

V

Petitioner contends that the application of the McCarran Act according to its plain terms would necessarily result in a "regulatory no man's land" which Congress could not have intended. In terms of the facts in the present cases this argument is fanciful and hypothetical; in these cases the alleged "no man's land" does not exist.

National and American are licensed in every State in which they disseminate advertising, and depend on the services of licensed local agents in each of these

States. Under these circumstances it is indisputable that each of the States in which respondents disseminate advertising possesses, and can effectively exercise, the power to regulate the advertising disseminated within its borders. When all the States have legislated, no possible gap remains.

The fact that permitting the application of the Federal Trade Commission Act might be "convenient" is entirely irrelevant. Congress in passing the McCarran Act was concerned not with convenience but with preserving to the States governmental powers which they had long exclusively exercised.

ARGUMENT

Preliminary Statement

In June 1944 this Court decided for the first time that the business of insurance when transacted across State lines is interstate commerce and subject to regulation by Congress under the Commerce Clause. *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533. For seventy-five years prior to that decision this Court had held that the Commerce Clause placed no restriction upon the power of the States to tax and to regulate the insurance business. As a result the States over the years had developed comprehensive regulatory and taxing systems which applied to insurance in ways and to limits that might not have been possible if State authority had been subject to Commerce Clause limitations.

The decision in the *South-Eastern Underwriters* case had two consequences that gave rise to grave concern on the part of the States, the insurance industry, and Congress. The first was that the decision subjected State authority for the first time to the limita-

tions of the Commerce Clause and thereby threatened the validity of existing State tax and regulatory systems. This was the result of the holding that insurance was "commerce" and when conducted across State lines was "interstate commerce".

The second consequence was that the decision, by subjecting the insurance business to the Sherman Act, indicated that it was also subject to other Federal regulatory statutes of general application which had been enacted by Congress under the Commerce Clause. Although the terms of those statutes properly could be read as applying to insurance, the statutes had not been drafted or passed with reference to the peculiar problems of the insurance business. For that reason it was evident that their unqualified application to insurance would create serious problems of legislative policy and might have effects not foreseen or intended by Congress when the statutes were passed.

Nine months after the *South-Eastern Underwriters* decision Congress dealt with these consequences by passing the McCarran Act. Both the words of the statute and its legislative history make it clear beyond dispute that in passing the statute Congress intended to accomplish two purposes. In the first place Congress intended that the States should be permitted to continue to regulate insurance free from Commerce Clause limitations, as had been the case prior to the decision in *South-Eastern Underwriters*. In the second place Congress intended that in general, but subject to particular exceptions, insurance should not be regulated by Federal statutes but by State law. To that end Congress included in the statute specific limitations on the application of Federal statutes to the insurance business.

The Federal Trade Commission now contends that its authority under Section 5 of the Federal Trade Commission Act extends to insurance advertising practices that are regulated by State law. In the first instance the Commission sought to justify this assertion of authority by an interpretation of the McCarran Act that gave supremacy to Federal law (see pp. 22-23, *infra*). In this Court counsel for the Commission have nominally retreated from this position; they now assert that the statute permits the exercise of concurrent jurisdiction but that in case of conflict State authority will prevail.

This reading of the statute is accompanied by asserted conditions and limitations which are of the utmost importance in understanding the nature and consequences of petitioner's argument. For one thing petitioner asserts that the Federal Trade Commission may always exert its authority unless the State laws have been actually enforced against, *i.e.*, specifically "applied" to, the particular transactions involved (Pet. Br., pp. 36, 53). The interpretation is further amplified by the suggestion that Federal authority may be exerted unless State law has been enforced against the particular transactions involved in such a way as formally to sanction advertising practices that the Federal regulatory authority wishes to forbid (Pet. Br., pp. 49-50). And the interpretation is still further amplified by the additional suggestions that if the Federal Trade Commission first asserts its jurisdiction by issuing a complaint against certain practices it cannot be deprived of jurisdiction by the subsequent action of a State agency, and, moreover, that if the Federal Trade Commission first proceeds to decision in an administrative proceeding that de-

cision will be *res judicata* as to the legality of the particular practices involved in such a way as to preclude any contrary exertion of State authority (*id.* p. 50 n. 32).

Under petitioner's construction of the statute neither an administrative conclusion reached by State regulatory authority that particular advertising practices are lawful and should not be the subject of a formal adversary proceeding, nor informal approval of particular advertising practices by that regulatory authority after consultation with the insurer involved—both normal and proper exercises of discretion by law enforcement officers—will serve to prevent the application and enforcement of the Federal Trade Commission Act.

It thus appears that in its effort to give content to its interpretation of the statute petitioner has robbed the abstract concession of State supremacy of all practical consequence or significance. This attempt to superimpose Federal authority upon State law, and to do so in terms which, despite petitioner's disclaimer, give practical supremacy to Federal authority, requires the McCarran Act to be read as if the proviso to Section 2(b) had no real meaning and disregards the manifest Congressional purpose that insurance practices should generally continue to be regulated by State law and not by Federal statutes.

Although petitioner denies that conflict could result from its interpretation of the Act, it is evident that the proposed construction would set petitioner up as the arbiter of the effectiveness of State regulation. Its decisions would necessarily be affected, even if only unconsciously, by a preference for its own regulation.

It is difficult to conceive of a surer road to Federal-State conflicts.

The arguments by which petitioner seeks to justify this result pay singularly little attention to the words of the McCarran Act or to the structure of the Act as a whole and either misconstrue or ignore decisive passages in the legislative history of the Act. Indeed, those arguments largely rest upon alleged grounds of policy which are without merit, and which in any event are more appropriate for legislative than for judicial consideration.

1. THE LANGUAGE AND GENERAL STRUCTURE OF THE MCCARRAN ACT SPECIFICALLY PRECLUDE THE ASSERTION BY THE COMMISSION OF JURISDICTION OVER INSURANCE ACTIVITIES AS TO WHICH THE STATES HAVE LEGISLATED

The McCarran Act opens with an unequivocal declaration of Congressional intention to place the responsibility for regulation of the insurance business in the hands of the States, which had held and exercised that responsibility before *South-Eastern Underwriters*. The first section states:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

The provisions of Section 2 of the Act, and particularly the words of the proviso attached to subsection (b) of Section 2, are decisive of the basic juris-

dictional issue in these cases. Subsection (a) of Section 2 provides that:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Having thus provided without qualification that the business of insurance shall be subject to State regulation and taxation, Congress proceeded in subsection (b) of Section 2 to impose limitations upon the application of Federal regulatory statutes to the business of insurance.

Section 2(b) in its entirety reads as follows:

> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The words of the proviso precisely define "the extent" to which the Federal Trade Commission Act is to apply to the business of insurance. The "extent" is explicitly stated in terms of the absence of regulation "by State law". The Federal Trade Commission Act is to apply to the business of insurance only to the extent that the business is not regulated by State law,

or, to state the matter in another way, if the business of insurance is regulated by State law then the Federal Trade Commission Act is not to apply. This reading of the proviso does not depend upon inference or implication; it is required by the plain and ordinary sense of the words which Congress chose to express its meaning.[4]

This view of the proviso is confirmed when its terms are contrasted with those used in the opening clause of Section 2(b). That clause provides in general terms that Federal statutes which do not specifically refer to insurance shall not invalidate, impair, or supersede State regulation or taxation. This language imposes a general limitation upon the application of a category of Federal statutes to the insurance business, the category of statutes being those that do not specifically refer to insurance and the limitation being that the statutes are not to apply in such a way as to invalidate, impair, or supersede State regulation or taxation. In the proviso Congress saw fit to deal explicitly with three named statutes, including the Federal Trade Commission Act, by imposing a specific limitation—that in any event those three statutes should not be applicable to the insurance business to the extent that such business is regulated by State law.[5]

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[4] The words were so understood in Congress when the proviso was under consideration, as we shall show later in the discussion of the legislative history. See pp. 27-37, *infra*.

[5] The legislative history shows that Congress attempted to deal specifically in various sections of the McCarran Act with the particular Federal statutes whose application to the business of insurance it was believed might create problems in Federal-State relationships. Thus in the proviso to Section 2(b) and in Sec-

It would thus appear that if the proviso to Section 2(b) is to be read as meaning what it says, the Federal Trade Commission Act is rendered inapplicable to National's and American's advertising practices by the existence of State regulatory legislation.

The majority of the Commission reached, and the petitioner here urges, a contrary conclusion. The Commission construed the proviso to Section 2(b) as meaning that the Federal Trade Commission Act shall apply to the "purely interstate" aspects of the activities of insurance companies even though the same activities are regulated by State law. The reasoning by which the Commission reached this conclusion did not depend upon the words of the statute—and indeed is antithetic to them—but as the Commission itself indicated was based upon certain assumptions with respect to constitutional limitations imposed by the Commerce Clause on the authority of the States to regulate interstate commerce.

The Commission's premise was that the Commerce Clause of its own force prevents the States from regulating interstate commerce, and that Congress has not removed and cannot remove this disability as to the regulation of interstate insurance transactions. Since the jurisdiction of the Federal Trade Commission is

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tions 3 and 4 Congress legislated explicitly as to the application of named statutes to the business of insurance. By contrast the opening clause of Section 2(b), which speaks in general terms, was obviously directed solely to any problems created by existing statutes overlooked by Congress or by future statutes. Thus in the debates the opening clause of Section 2(b) was described by Senator O'Mahoney as "a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but of which we did not have knowledge at the time" (91 Cong. Rec., Part 1, p. 483).

in any event restricted to practices "in" interstate commerce, *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, the Commission was forced by its premise to the incongruous conclusion that the last twelve words of the proviso to Section 2(b)—"to the extent that such business is not regulated by State law"—have no meaning whatever as applied to the Federal Trade Commission Act. For on the Commission's theory the Federal Trade Commission Act would continue to apply to all the activities to which it had ever applied, even though it "in one sense would supersede a State law covering the same subject matter in a different and local phase of the transaction" (A.R. 75).[6]

Counsel for the Commission appear now to concede that the premise upon which the Commission proceeded is erroneous (Pet. Br., pp. 38-39, 41). They recognize, as they must, that "Congress has undoubted power to redefine the distribution of power over interstate commerce", *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769, and that the McCarran Act is an exercise of this power, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408. They continue to urge, however, that the terms of the McCarran Act, and particularly the words of the proviso to Section 2(b), do not prevent the exercise of Federal Trade Commission jurisdiction in the cases before this Court.

To reach this result counsel have rejected the Commission's construction of the statute, and have adopted a construction explicitly repudiated by the Commis-

[6] The Commission thus treated the Federal Trade Commission Act as if it had been among the statutes listed in Section 4 of the McCarran Act, the application of which the latter Act was not to "affect in any manner".

sion. The Commission had concluded that in the event of conflict between the terms or application of the Federal Trade Commission Act and State legislative provisions the former must prevail, because Congress must have "contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof" (A.R. 75). Counsel now dismiss this conclusion as only *obiter dicta,* recognizing that the *Prudential* case and *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange,* 181 F. 2d 174 (C.C.A. 8), *certiorari denied,* 340 U. S. 823, establish the contrary (Pet. Br., pp. 36-37 n. 24). They now advance a theory of general concurrent jurisdiction, under which the Federal Trade Commission Act would continue to apply to the advertising of any particular insurance company unless the States formally and explicitly sanctioned that advertising, by legislation or after formal hearing.

As we have pointed out, the Federal Trade Commission construed the proviso in a manner that flatly disregarded the overall structure of the statute by giving the Federal Trade Commission precisely the same degree of jurisdiction that it would have had if reference to it had been contained in Section 4 of the statute, which lists the Federal regulatory statutes whose application to the business of insurance the McCarran Act was not to "affect in any manner".

Counsel for the Commission seek to avoid this difficulty by conceding that the Commission was in error in stating that the Federal Trade Commission Act would supersede State law in the event of conflict.

Their reading of the proviso, however, is subject to an equally serious difficulty of the same kind. Section 2(b) of the statute, apart from the proviso, provides that:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: * * *"

On petitioner's construction of the proviso it becomes nothing more or less than a reiteration of the language above quoted. As the Federal Trade Commission itself recognized in its opinion, which explicitly rejects the interpretation of the proviso now urged by its counsel (A.R. 74):

> "* * * [I]f this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance."

There is no warrant for rendering meaningless, as petitioner's argument does, an integral part of the statute, and it is significant that the Federal Trade Commission itself recognized the indefensibility of such a construction and expressly repudiated it.[7]

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[7] Petitioner's theory of general concurrent jurisdiction, with State policy supreme in the event of conflict, is curiously contradicted even as it is advanced. Petitioner strongly implies that once a Commission complaint is carried to judgment, whether in favor of or against the respondent, the States are precluded from taking any action which would impair the force of the judg-

Commission counsel, in support of their theory of general concurrent jurisdiction, make one attempt to grapple directly with the words of the McCarran Act which are decisive in these cases—"to the extent that such business is not regulated by State law". They take the position that one who engages in conduct outlawed by a State statute providing for enforcement through an administrative process is not in fact "regulated by State law" until the statute has been actually enforced against him through formal proceedings.

This suggestion, which will be discussed in more detail later in our argument, must fail because it requires the acceptance of a distinction—between permissive and prohibitory legislation—which is nowhere remotely suggested in the McCarran Act; because it demands a reading of the Act which does violence to its words; and because it cuts strongly against the fact, conceded by Commission counsel, that Congress in passing the McCarran Act intended that State rather than Federal policy should control in the regulation of the insurance business. It requires the words "regulated by State law" in the proviso to Section 2(b) to be read as if they in fact said, "subject to a formal administrative determination arrived at in a State proceeding". There is no basis for thus substantially rewriting the words which Congress used to express its intention.

Another basic difficulty with counsel's interpretation is that it is nowhere explained why, if the statute

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ment reached in the Federal proceeding (Pet. Br., p. 50 n. 32). The applicability of State law to an insurance company's advertising practices is thus potentially made to depend upon whether those practices are first challenged by State or Federal authority. It is difficult to see anything in the McCarran Act which supports this undeniably bizarre result.

means what counsel would have it mean, Federal Trade Commission jurisdiction is ousted only in the event of a formal State administrative determination, made prior to the exercise of that jurisdiction, that particular advertising does *not* violate State law. Necessarily advertising which has been formally challenged and found illegal is even more "regulated" than advertising which has been formally approved. Yet counsel urge that the McCarran Act basically contemplates a concurrency of State and Federal jurisdiction, with the latter being ousted only in the event of direct, open, and unmistakable conflict. Under these circumstances, counsel's single attempt to come to grips with the relevant statutory language results in a contradiction, rather than a justification, of their basic theory.

II. The legislative history of the McCarran Act shows that Congress intended that Federal Trade Commission jurisdiction should exist only in the absence of State legislation

We have pointed out that the words of Section 2(b) of the McCarran Act, read without the assistance of any extrinsic aids to construction, plainly provide that the Federal Trade Commission Act is not to apply to the business of insurance to the extent that the business is regulated by State law. The legislative history confirms the plain meaning of the words of the statute. It may be briefly summarized.

The proviso to Section 2(b) was not contained in the bills as first passed by the House of Representatives and the Senate. Those bills simply provided without qualification that nothing contained in the Federal Trade Commission Act should apply to the

business of insurance (91 Cong. Rec., Part 1, p. 1085). The Committee Reports on those bills therefore throw no direct light on the meaning of the proviso to Section 2(b).

The proviso was added to the bill in the conference that took place between the two houses. Neither the Conference Report nor the statement that accompanied the report to the House of Representatives (*id.* pp. 1357, 1396) contained any comment on the new proviso to Section 2(b). In the House of Representatives the Conference Report was approved without debate (*id.* pp. 1395-1396). In the Senate, however, the proviso to Section 2(b) was discussed prior to approval of the Conference Report, and the statements made in the course of that discussion make it abundantly clear that the proviso was understood as meaning that the Federal Trade Commission Act and the other statutes enumerated in the proviso to Section 2(b) should not apply to the business of insurance to the extent that the States had enacted legislation for its regulation.

At the very beginning of the consideration of the Conference Report in the Senate the following colloquy took place (91 Cong. Rec., Part 2, p. 1442):

> "Mr. Murdock. As I understand the conference report which is now before the Senate, it provides for a 3-year moratorium, which is fixed as ending on January 1, 1948, against the invoking of the Sherman Act and the Clayton Act, and it provides that they shall again be in force after that period without any affirmative action on the part of the Congress, except as regulatory matters have been enacted by the States relating to subjects covered by those acts—

"Mr. McCarran. During the moratorium. Regulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948.

"Mr. Murdock. But is it not the purpose of the bill and does not the bill accomplish this—

"Mr. McCarran. It accomplishes a moratorium for 3 years against the operation of the acts mentioned, namely, the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, as amended, and the Robinson-Patman Antidiscrimination Act.

"Mr. Murdock. So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?

"Mr. McCarran. That is correct.

"Mr. Murdock. And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective except—

"Mr. McCarran. Except as the States themselves have provided regulations."

This colloquy can only mean that the enactment of legislation by any State—whether that legislation be consistent or inconsistent with the enumerated Federal statutes—would *ipso facto* displace Federal jurisdiction under these statutes as to the subject matter covered by the State regulatory legislation.

Shortly thereafter, Senator Pepper read to the Senate the complete text of Section 2, stating that he was "a little disturbed" by what he discovered in paragraph (b) of Section 2. The following colloquy then ensued (*id.* p. 1443):

"Mr. Pepper. * * * Does that mean that after January 1, 1948, the States may determine

whether or not the Sherman and the other acts become applicable to the business of insurance?

"Mr. McCarran. The answer to that question is 'Yes.' During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.

* * *

"Mr. Pepper. * * * Apparently the conference report goes further than I had understood it to go. It does not stop with a moratorium at the end of 3 years. At the end of 3 years the moratorium would continue if in the meantime a State had regulated the business to any extent whatever. That would defeat the Supreme Court decision.

"Mr. McCarran. The moratorium would not be continued, *but if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective.*" (Emphasis added)

Petitioner suggests that a part of this passage "would seem to give affirmative support to the Government's position" (Pet. Br., p. 58). Counsel assert that when Senator McCarran said "If they do enact such legislation, to the extent that they regulate, etc. * * *" he was distinguishing between "legislation" and "regulation" and that his statement therefore supports the inference that he meant that the enactment of legislation is insufficient and the proviso re-

quires that a State actually enforce its legislation against particular transactions (*id.* pp. 58-59).

The language of Senator McCarran provides no rational basis for this inference. In context the words "to the extent that they regulate" simply mean that unless the States have legislated as to subject matter covered by the named Federal statutes, then those statutes will apply. It is also clear that in his discussion of the legislation Senator McCarran used the words "legislation" and "regulate" as meaning the same thing. In the very passage to which the petitioner refers, Senator McCarran explicitly stated that the applicability after the expiration of the moratorium of the statutes enumerated in the proviso would depend upon the failure of the States to "enact legislation", and a few minutes earlier he had said that "regulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948".

Senator Ferguson thereafter confirmed the previous answer of Senator McCarran in these words (91 Cong. Rec., Part 2, p. 1443):[8]

> "Mr. Ferguson. * * * After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. ***But insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.***" (Emphasis added)

This is not the language of concurrent jurisdiction. It would be difficult to express in plainer terms the

[8] Senators McCarran and Ferguson were two of the conferees on behalf of the Senate.

statutory intent, that when the States have legislated the application of the three Acts ceases *in toto*.

Even more plainly contradicting the petitioner's suggestion that Congress intended that only State law explicitly sanctioning false advertising should oust Commission jurisdiction are two exchanges which took place between Senator McCarran and Senator Pepper during the debate in the Senate. Senator Pepper, attacking the proviso to Section 2(b), stated (*id.* p. 1444):

> "[T]he legal effect of the proviso which the Senator has just read is that a State can absolutely prevent the applicability of the Sherman Antitrust Act and the Clayton Act to insurance companies doing business in the State *by passing a State act which will make combinations and restraints of trade unlawful in that State.* As a practical matter, we know that the States cannot and will not enforce these laws against these insurance companies." (Emphasis added)

Senator McCarran, who was engaged in explaining the proviso to the Senate, said nothing to contradict the interpretation thus offered, but contented himself with concurring with a statement by Senator White that the Federal acts would continue to apply in areas not reached by State legislation.

In the next day's debate Senator Pepper again stated his understanding of the proviso to be that (*id.* p. 1478):

> "* * * for all future time the Sherman Act, the Clayton Act, and the Federal Trade Commission Act shall not apply to the business of insurance except in a State which has not regulated the in-

surance business or to the extent a State has not denied the effect of such Federal acts.

"Mr. President, if that language had contained the limitation that the State regulation, in order to be valid, must not be inconsistent with the Clayton Act or the Sherman Act, I should have no objection to it."

Again Senator McCarran took no exception to the accuracy of Senator Pepper's interpretation, merely responding that "the Congress of the United States would not attempt to tell a State how and upon what subject it should legislate" (*id.* p. 1479).

In its discussion of the legislative history petitioner relies heavily upon certain remarks of Senator Ferguson to the effect that State regulation contrary to the Sherman, Clayton, or Federal Trade Commission Act would, except in the instances set forth in Section 3(b), control (Pet. Br., p. 59). We fully agree that the passages cited are, as far as they go, an accurate description of the effect of the McCarran Act. Petitioner, however, seeks to draw from them the negative inference that it was the intention of the proviso to Section 2(b) that State legislation consistent with the Acts there cited would not oust Federal jurisdiction.

This reasoning will not bear examination. The passages to which petitioner refers appear in a debate in which Senator Ferguson was not abstractly expounding the meaning of the proviso, but was rather responding directly to a question by Senator Pepper expressly limited to the effect of the proviso when State regulatory statutes conflicted with the statutes there enumerated. Under these circumstances, a discussion of the inapplicability of the Federal legislation in the face of consistent State legislation would

have been simply unresponsive. The fact that Senator Ferguson did not here refer to this aspect of the proviso's effect thus provides no basis for the inference which petitioner seeks to draw.[9]

Counsel for the Commission also point to a colloquy on the Senate floor between Senators O'Mahoney and Pepper (Pet. Br., pp. 60-61). It is not altogether clear in what respect this colloquy is believed to support counsel's position. The statements by Senator O'Mahoney particularly relied upon, to the effect that "State regulation must be for the State and not for the United States" and that "nothing in the proposed law would authorize a State to try to regulate for other States" appear to be merely a recognition that there are jurisdictional limits upon regulation by a State of activities which do not impinge upon its borders, and as to which it has no legitimate local interest.

These statements are entirely consistent with the express statements made in the Senate which have been quoted at pages 28-33, *supra*, to the effect that when a State has legislated as to insurance activities affecting it, the Federal Trade Commission Act and the other statutes named in the proviso to Section 2(b) are not to apply as to that State. The entire colloquy shows that Senator O'Mahoney's statements were not intended to suggest any doubt about the capacity of a State to regulate insurance transactions in which the State has a legitimate interest even though the regulation might apply to transactions in interstate

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[9] In the previous day's debate, Senator Ferguson had made it clear that the proviso would come into play whenever a State had "specifically legislated" on the subject matter of the three statutes named in the proviso. See p. 31, *supra*.

commerce. See particularly the exchange between Senators Pepper and Ferguson with respect to the activities of rate-making bureaus at 91 Cong. Rec., Part 2, p. 1484.

Finally, petitioner devotes considerable attention to statements made on the floor of the House during a debate which took place before the proviso was added to Section 2(b) in conference. These statements are said to indicate a "desire to continue the application of the Federal Trade Commission Act to false advertising of insurance" (Pet. Br., pp. 62-64). The difficulty with this reasoning is that the remarks referred to were made at a time when the draft Act contained a provision flatly exempting the business of insurance from the Federal Trade Commission Act, whether or not the States had regulated the same subject matter. Under these circumstances, it is not surprising that concern was expressed over the possibility that various unfair practices in the insurance industry would not be interdicted by either State or Federal law. The elimination of this exemptive provision and the addition of the proviso were directly responsive to this concern, since by the terms of the proviso Federal law continues to apply unless displaced by State legislation.

The notion that the proviso to Section 2(b) requires something more than the enactment of legislation by the States, or that the application of the proviso depends in any way upon the diligence of the enforcement efforts made by States under their legislation, is flatly inconsistent with statements made in the Senate when the proviso was under consideration. For example, Senator Barkley, shortly before the Senate voted on the bill, stated (91 Cong. Rec., Part 2, p. 1488):

"I have been somewhat disturbed by the provision in subsection (b) of section 2 of the conference report. However, I think that under the interpretation given it by the conferees my doubts have been resolved, and I intend to vote for approval of the conference report. But I wish it to be understood that in voting for approval of the conference report I am accepting the interpretation placed upon it by the conferees, namely, that if any State, through its legislature, undertakes to go through the form of regulation merely in order to put insurance companies within that State on an island of safety from congressional regulation, that effort will be futile, and not only can Congress deal with any phase of the insurance business not dealt with by a State legislature, but even in a case in which a State legislature deals with any phase of it, but does not deal with it adequately in the opinion of Congress, Congress is not in any way barred by the conference report from dealing with that subject and with the phase of it which Congress deems to have been inadequately dealt with by the State; so that hereafter we can enact such legislation as we may deem proper and wise to have enacted in connection with the regulation of this business, which clearly is interstate commerce."

This passage is an explicit recognition of the fact that the proviso meant that the States might remove the insurance business from the ambit of the Sherman, Clayton, and Federal Trade Commission Acts by legislation covering the same ground, whether that legislation were consistent or inconsistent with the Federal statutes. Senator Barkley was willing to accept the bill because he recognized that Congress necessarily retained the power to alter the situation by future legislation if the cession of exclusive jurisdic-

tion to those States which chose to legislate proved unsatisfactory or unworkable.[10]

III. The arguments and authorities relied upon by petitioner do not support the suggestion that Congress intended that the McCarran Act should oust Federal Trade Commission jurisdiction only in the event of "inconsistent" state legislation

As we have seen, counsel for the Commission have abandoned the theory upon which the Federal Trade Commission upheld its own jurisdiction in these cases, recognizing that it was based upon an erroneous premise of constitutional law. Counsel now adopt legal theories which, although incompatible with the Commission's opinion and to some extent inconsistent with one another, permit them to reach a result identical with that reached by the Commission.

Each of petitioner's arguments appears to depend on the assertion that in the present cases there is no conceivable conflict between State and Federal policy—that "here the state statutes and the federal act are entirely consistent and complementary" (Pet. Br., p. 38).[11] Thus counsel point out that *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange*, 181 F. 2d 174 (C.C.A. 8), *certiorari denied*, 340 U. S. 823, in which the proviso to Section 2(b)

[10] Statements of similar import were made by Senators McCarran and Murdock (91 Cong. Rec., Part 2, pp. 1478, 1482).

[11] This assertion disregards the fact that "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law". Garner v. Teamsters Union, 346 U. S. 485, 490-491.

was read as precluding the application of Federal law, involved a situation where the conduct sought to be attacked under the Federal statute was specifically sanctioned by State law (Pet. Br., p. 37). Counsel urge that only in cases where this immediately apparent conflict is presented should the McCarran Act be read as ousting Federal Trade Commission jurisdiction.

The difficulty with this assertion is that it fails to take account of the words of the statute but instead addresses itself essentially to a hypothetical legislative problem.

Legislative policy is for Congress to determine, and diverse situations, each with the unique history and circumstances which surround it, call for different legislative solutions. In the passage of the McCarran Act, Congress was dealing with an area of regulatory jurisdiction which for seventy-five years had rested exclusively with the States until the decision in *South-Eastern Underwriters* served notice that Federal regulatory statutes of general application, promulgated under the Commerce Clause, would be read as applying to the interstate business of insurance. Under these circumstances it is not surprising that Congress saw fit, in the exercise of its plenary power over interstate commerce, to return to the States a measure of the exclusive jurisdiction which they had long possessed. As this Court has stated in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 320-321, with reference to another aspect of the insurance business:

> "Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceed-

> ingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the States." [footnotes omitted]

Petitioner asserts that "the problem of determining the effect of the McCarran-Ferguson Act on federal authority over insurance is remarkably similar to the problem of determining the effect of the Twenty-first Amendment on federal authority over liquor" (Pet. Br., p. 39). In fact this analogy is fatally defective because there is nothing in the Twenty-first Amendment which states that Federal jurisdiction shall cease altogether in the event of State legislation. There is no language in the Twenty-first Amendment that even remotely resembles the language of the proviso to Section 2(b) of the McCarran Act. In the McCarran Act Congress used different words to express a different policy, by providing not only that State law might apply without impediment from the Commerce Clause, but that to the extent it did apply certain Federal laws would not.

Defective also, and for much the same reasons, is petitioner's attempted analogy between the McCarran Act and the Federal Power Act (Pet. Br., p. 50 and n. 33). This Court has never held that the words "not subject to regulation by the States" in Section 201(a) of the Federal Power Act can be wholly ignored or disregarded. On the contrary the Court in the very passage from *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 527, which is quoted in part in note 33 of petitioner's brief said, in words which counsel have chosen to omit from the quotation:

> "But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent. It cannot be wholly ignored."

In cases arising under the Power Act the Court has suggested that the general declaration in Section 201(a) cannot nullify a clear and specific grant of jurisdiction given to the Federal Power Commission by other provisions in the statute. *Connecticut Light & Power Co.* v. *Federal Power Commission, supra.* But that statement has no application here. Apart from the proviso to Section 2(b) there is no provision in the McCarran Act which makes a grant of jurisdiction to the Federal Trade Commission.[12] What counsel for the Commission are seeking to do is to excise from the only grant of jurisdiction that the McCarran Act makes to the Federal Trade Commission those words of the grant that limit Commission jurisdiction to matters "not regulated by State law". The decisions under the Federal Power Act provide no warrant for this kind of a surgical operation on the body of the proviso.[13]

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[12] The jurisdiction over the interstate business of insurance which the Federal Trade Commission Act itself might properly, after South-Eastern Underwriters, be read as granting is by no means "specific". As this Court pointed out in the Prudential case (328 U. S. at 415), during the 75 years before the decision in South-Eastern Underwriters "Congress legislated only in terms applicable to commerce generally, without particularized reference to insurance".

[13] The asserted analogy also disregards the wide difference between the premises of the McCarran Act and the Federal Power Act. The language of the Federal Power Act "indicates no consideration or desire to alter the limits of state power otherwise imposed by the constitutional commerce clause". United States v. Public Utilities Commission of California, 345 U. S. 295. As the

All of the available evidence indicates that the primary purpose of the McCarran Act was not to secure the uniformity under Federal law which is implicit in petitioner's theory of general concurrent jurisdiction. Rather, as this Court has stated in *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 430, in passing the McCarran Act:

> "* * * Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes enacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations."

IV. Insurance advertising is "regulated by state law" when states adopt comprehensive regulatory statutes specifically dealing with the subject

The proviso to Section 2(b) of the McCarran Act states that the Federal Trade Commission Act shall

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Prudential case establishes and the petitioner concedes, the McCarran Act did alter the limits of State power by removing all Commerce Clause impediments to its exercise.

The lack of similarity between the Federal Power Act and the McCarran Act is demonstrated by the fact that this Court has read the former, in the Public Utilities Commission of California case, as confirming the supremacy of Federal law and asserting exclusive Federal jurisdiction over broad regulatory areas. *Cf.* Natural Gas Pipeline Co. v. Panoma Corp., 349 U. S. 44. Petitioner makes no contention that the McCarran Act permits a like result.

not apply to the business of insurance to the extent that that business is regulated by State law. Building upon their premise that in the area of insurance advertising it is desirable as a matter of "policy" that Federal as well as State law shall apply, counsel for the Commission postulate a controlling distinction between permissive and prohibitory State statutes. They urge that whereas conduct authorized by the former may properly be said to be "regulated by State law", conduct outlawed by the latter is not so regulated within the meaning of the proviso until the statute has been actually enforced against it.

As we have pointed out above, there is nothing either in the words of the statute or in its legislative history which lends support to this strained interpretation. It appears to be based largely upon a misconception of the nature of State statutory and regulatory standards in the area of insurance advertising and disregards the great likelihood of actual conflict between State and Federal regulatory authority if only formal affirmative action by the former can serve to oust the jurisdiction of the latter. *Cf. Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767.

Petitioner points to the fact that many of the State statutes providing for insurance regulation broadly prohibit "unfair methods of competition" and suggests that because of the breadth of this prohibition it cannot be regarded as "regulation" until content has been given to it by the completion of a particular enforcement proceeding. This argument is inapposite because we are not here concerned with the whole gamut of "unfair methods of competition" and "unfair or deceptive acts or practices" but rather only with advertising which is charged to be false. The

Model State Fair Trade Practices Act for insurance, already adopted by some 41 States and by Alaska, Hawaii, and Puerto Rico, contains a provision reading specifically on the dissemination of advertising which is "untrue, deceptive or misleading". See, *e.g.*, Kansas G. S., Art. 24, § 40-2404(2) (Supp. 1955), set forth at page 68 of petitioner's brief. This standard is fully as precise and explicit as that contained in Federal statutes the violation of which subjects the offender to judicial prosecution without any prior administrative proceeding. See, *e.g.*, Federal Food, Drug & Cosmetic Act, 52 Stat. 1047, 1049, 1054 (1938), 21 U. S. C. §§ 343(a), 352(a), 362(a).[14]

It is a perversion of language to suggest that the conduct of one subject to a State prohibitory statute is not "regulated" by that statute until a formal administrative proceeding challenging the conduct is undertaken and carried to completion. The fact that the sanction may, if the conduct is found to violate the law, in the first instance take the form of a cease-and-desist order rather than that of fine, imprisonment, or licen e revocation is irrelevant. That this choice of sanction is not unresponsive to the legislative problem to which it is directed is perhaps most economically demonstrated by the fact that the Federal Trade Commission Act, which the petitioner seeks here to apply, itself authorizes the imposition of only

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[14] In addition, on December 1, 1955, the National Association of State Insurance Commissioners promulgated a detailed set of Rules Governing Advertisements of Accident and Sickness Insurance, implementing and interpreting the State statutes governing misleading advertising. Already more than half of the States have put these Rules into effect and others are expected to follow. These Rules have been further supplemented by a detailed interpretative guide also prepared by the National Association of State Insurance Commissioners.

this sanction by the agency. Under the Model Act each violation of a cease-and-desist order is punishable by a fine and in the discretion of the administrator by revocation of the offender's license or certificate of authority to engage in the insurance business in the State.

The petitioner's position that under prohibitory State statutes there is no "regulation" without formal enforcement action ignores the fact that proper State administration may involve considered inaction as well as action. There are a variety of possible reasons why an administrator does not proceed to take action against a particular individual or corporation. Undoubtedly a most common one is that the individual or corporation has not, in the opinion of the administrator, violated the statute which the administrator is charged with enforcing. Like the Federal Trade Commission Act, the Model Act provides for no procedure whereby insurance companies may tender advertising for administrative scrutiny and approval before its dissemination. In these circumstances the fact that the records in these cases do not disclose formal action by State agencies directed to the advertising here in question does not establish State dereliction or lack of diligence.

There is necessarily room for differences of opinion as to whether any particular advertising phrase is "untrue, deceptive or misleading".[15] Administrative

[15] This fact is strikingly demonstrated in the present cases. In No. 435 the Hearing Examiner disagreed with the majority of the Commission as to whether certain advertising representations violated the Federal Trade Commission Act (N.R. 194), and in No. 436 the Hearing Examiner would have dismissed on the merits every charge made in the Commission complaint (A.R. 58).

officers are vested with discretion in the exercise of their powers and the performance of their duties. Different officers or agencies in the determination of matters within their jurisdiction can reasonably reach varying conclusions from identical facts. It is entirely possible that State and Federal administrators of statutes similarly phrased could differ as to whether specific practices were permitted and should be allowed to continue, or were prohibited and should be stopped. If Congress' decision that State policy should control is to be truly respected, each State must be free to make its own judgment and to reflect it either in the institution of a formal proceeding or in informal conference or equally to reflect it in an administrative decision to take no action whatever. As this Court has pointed out in the *Prudential* case (328 U. S. at 431 n. 39):

> "The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of *Cooley* v. *Board of Wardens,* 12 How. 299, except as otherwise expressly declared."

Petitioner's arguments assume that because Federal and State legislation both express a determination that false advertising is contrary to the public interest no conflict is possible in the administration of this legislation. This assumption is the negation of the flexibility of the administrative process. It rests on the unsupported premise that an inevitable inference of State dereliction necessarily arises if State authorities have not instituted proceedings against advertising believed by the Federal Trade Commission to violate the Federal Trade Commission Act. This

assumption is unwarranted, and if accepted would defeat the intent of Congress that State policy is to control even at the price of the greater uniformity which might result from giving the Federal Trade Commission supreme and controlling authority. The only way to avoid unseemly conflicts is to respect the policy of Congress to grant exclusive jurisdiction to the States in areas which the States have occupied by regulatory legislation.

V. Exclusive State regulation of insurance advertising does not result in a "regulatory no man's land"

As we have seen, the Commission in its opinion embraced the theory that under the proviso to Section 2(b) the Commission must retain authority to regulate insurance advertising because Commerce Clause inhibitions prevent the States from legislating to an "extent" sufficient to satisfy the requirements of the proviso. Although counsel for the Commission have abandoned this theory they now advance a somewhat different theory which leads to a remarkably similar result.

The theory appears to be that despite the removal of all Commerce Clause impediments to State regulation of insurance, an application of the McCarran Act according to its plain terms would nevertheless necessarily result in a "regulatory 'no man's land'" which Congress could not have intended (Pet. Br., p. 41). Therefore, the argument proceeds, despite the plain words of the proviso Congress must be presumed to have intended that the Federal Trade Commission Act should continue to apply to the business of insurance when conducted across State lines

unless and until the States affected by that business enact legislation contrary to the terms of that Act. Only in this way, it is asserted, can the common policy expressed in the Federal Trade Commission Act and the many similar State statutes adequately be implemented.[16]

In fact, petitioner nowhere identifies the "regulatory no man's land" and "legal vacuum" to which it frequently adverts as inevitably appearing if the proviso to Section 2(b) is taken as meaning what it says. General quotations from the language of decisions of this Court are not a substitute for scrupulous attention to the precise facts of the present cases.[17]

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[16] This argument overlooks the fact that it is not primarily the policy of the Federal Trade Commission Act but rather the policy and the words of the McCarran Act which are in issue in these cases. Even if the regulatory gap which petitioner attempts to conjure up had a real as opposed to a fanciful existence this Court would have no mandate to fill the gap unless it were the will and intent of Congress that it should be filled. "Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no man's land." Guss v. Utah Labor Relations Board, 353 U. S. 1, 11.

Counsel place heavy reliance on the fact that one of the declared purposes of the McCarran Act was "to secure adequate regulation and control" of the insurance business (Pet. Br., p. 44). This is precisely why Congress in the statute removed Commerce Clause impediments to the reach of State legislation, thus doing away with any possible constitutionally induced "no man's land".

[17] As the Court of Appeals for the Fifth Circuit unanimously stated (A.R. 116):

> "The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. * * * (Citing and quoting from Hoopeston Canning Co. v. Cullen,

National and American are both licensed in every State in which they disseminate advertising, and both depend upon the services of licensed local agents. Counsel have conceded that the Commerce Clause presents no obstacle to the application of State statutes regulating insurance advertising. Given these facts, it is difficult to detect the hiatus which counsel profess to fear. Each State is fully competent to regulate the advertising of insurance within its own borders, and together they are necessarily fully competent to regulate that advertising throughout the United States.

Petitioner cites on page 46 of its brief numerous cases which stand for the proposition that the "Fourteenth Amendment imposes substantial limitations on the power of the states to regulate out-of-state transactions". This proposition has no relevance here. If all the States in which an insurance company does business have enacted regulatory legislation, the fact that any single State's legislation may have a narrower geographical incidence than that of the Federal Trade Commission Act does not create a "regulatory no man's land". The real question is whether a State has the power to regulate advertising which is disseminated to the public within its own borders, irrespective of where that advertising originates. It is indisputable that such power exists, *Travelers Health Ass'n* v. *Virginia*, 339 U. S. 643, and that it may be effectively exercised when the disseminator is

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318 U. S. 313).

"If there is an 'irreducible area' of Commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it."

licensed by the State and employs agents also so licensed. *Cf. Robertson* v. *California*, 328 U. S. 440.[18]

There is some suggestion in petitioner's brief that permitting the application of the Federal Trade Commission Act is desirable simply as a matter of convenience, because that Act is nationwide in impact whereas the regulatory statutes of any particular State may have a narrower geographical incidence (Pet. Br., p. 47). This suggestion ignores the fact that in passing the McCarran Act, Congress was concerned not simply with convenience, but with preserving to the States governmental powers which they had long exclusively exercised. As this Court has said in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 530:

> "[S]tate lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed."

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[18] Petitioner expresses concern over the "acute problem presented when an insurance company employs no local agents and has no office or assets within the State" (Pet. Br., pp. 47-49). We do not deem it necessary to discuss this question since it is in no way presented in these cases. Both National and American are licensed in every State in which they disseminate advertising and employ locally licensed agents in each of these States (N.R. 32, 188; A.R. 69).

For the same reason, it is unnecessary here to discuss counsel's contention (Pet. Br., pp. 45-47) that the State of domicile of an insurance company is constitutionally disabled from regulating the advertising practices of that company throughout the United States.

CONCLUSION

For the foregoing reasons, we respectfully urge that the judgments of the Courts of Appeals must be affirmed.

Respectfully submitted,

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No. 436

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on April 9, 1957.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 10–18) is reported at 243 F. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1957 (Appendix B, *infra,* p. 19). The time for filing a petition for writ of certiorari was extended by Mr. Justice Black on June 27, 1957, to September 6, 1957 (Appendix C, *infra,* p. 20). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

437780—57——1

QUESTION PRESENTED

Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) authorizes the Federal Trade Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. The question presented is whether the McCarran-Ferguson Act (15 U. S. C. 1011–1015) is to be construed as divesting the Commission of jurisdiction over false and misleading advertising in connection with the interstate sale of insurance because of the mere enactment of state laws prohibiting such practices within the boundaries of the states involved.[1]

STATUTES INVOLVED

The statutes involved are pertinent provisions of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45, and the Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 15 U. S. C. 1011–1015 (herein referred to as the McCarran-Ferguson Act). These are the same statutes that are involved in the accompanying petition for a writ of certiorari in *Federal Trade Commission* v. *National Casualty Company,* and are reproduced in that petition at pages 2–4.

STATEMENT

On October 14, 1954, the Federal Trade Commission issued a complaint against the respondent, The American Hospital and Life Insurance Company, charging

[1] This is the same question as that presented in the accompanying petition for a writ of certiorari in *Federal Trade Commission* v. *National Casualty Company.*

that the company had, in the course of its interstate business of selling accident and health insurance, falsely advertised its insurance policies and thereby violated the Federal Trade Commission Act (R. 8–16). The company filed answer in which it admitted that it had advertised its accident and health insurance policies as charged in the complaint but denied that its advertising was false or misleading and denied that it had violated the Federal Trade Commission Act (R. 21–33). The company's answer affirmatively alleged that under the McCarran-Ferguson Act the Commission was without jurisdiction over the company's interstate insurance business because of the enactment of state statutes regulating unfair or deceptive acts or practices within the states involved (R. 19–21).

The facts. The basic facts relating to the conduct of respondent's business as found by the Commission are as follows:

The American Hospital and Life Insurance Company is a Texas corporation with its principal place of business in that state. It is engaged in selling life, health, and accident insurance and is licensed to sell such insurance in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. The challenged representations related only to its accident and health insurance business, from which it received premiums of $4,835,523.05 in 1953 and $5,009,184.47 in 1954 (R. 92–93).

Respondent sells its health and accident insurance policies through agents in the various states where it is licensed to do business. When an agent in a state other than Texas secures an application for a policy, the agent sends the application through the mail with the premium payment to respondent in Texas, where the policy is issued. The policy is mailed by respondent to the agent in the other state for delivery to the purchaser (R. 93, 94–95).[2]

For the purposes of selling insurance, respondent prepares and sends circulars or brochures from Texas to its agents located in the various states in which it is licensed. These circulars or brochures, which contain the challenged representations, are used by the agents and shown by them to prospective purchasers as aids in selling the policies to which they refer. Upon completion of a sale, the advertising portions of the circular or brochure are left with the purchaser (R. 94).

Hearings were held before an examiner who issued an initial decision in which he ordered that the complaint be dismissed (R. 87). On the basis of the McCarran-Ferguson Act, the examiner held that the Commission had no jurisdiction with respect to allegedly

[2] In the substantial number of cases where purchasers of policies have moved from states where respondent was licensed to do business into states where respondent was not so licensed, respondent's practice is to mail premium notices and receipts to and to receive premium payments from the policyholder. Premium payments so received amounted to $47,305.72 in 1953 and $78,417.89 in 1954 (R. 93–94).

false and deceptive acts and practices in commerce carried on by respondent except with persons living in the state of Mississippi (R. 57).[3] He further held that the charges of the complaint as to the false and misleading nature of the advertising had not been established (R. 57–87).

The Commission decision. The examiner's decision was reversed by the Commission, holding that all but one of the advertising representations set forth in the complaint were unfair and deceptive as charged (R. 90–101). It further held that it had jurisdiction over the unfair and deceptive advertising practices of respondent in interstate commerce, irrespective of whether the states involved had adopted local laws relating to such practices (R. 104–122), and entered an order consonant with its views (R. 101–103).[4]

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[3] He found that ten of the states in which respondent does business (Arizona, Arkansas, Colorado, Indiana, Kansas, Kentucky, Louisiana, New Mexico, Oklahoma, and Tennessee) had enacted statutes identical, or substantially identical, with the so-called "Model Unfair Trade Practices Bill for Insurance," which prohibits unfair methods of competition and unfair and deceptive acts and practices in the insurance business; that two of the other states in which respondent does business, Missouri and Illinois, had comparable statutes; that Mississippi did not; and that the statutes of Texas were immaterial since respondent's business within that state was intrastate (R. 51–56).

In the period between the examiner's decision and the Commission's decision, the state of Mississippi enacted a regulatory statute (R. 158).

[4] The Commission's opinion is reproduced as Appendix D of the accompanying petition in *Federal Trade Commission* v. *National Casualty Co.*

On the question of its jurisdiction, the Commission recognized that the McCarran-Ferguson Act was enacted for the purpose of allowing the states to continue to regulate the business of insurance in their usual manner, thus dispelling doubts raised by *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. But the Commission did not read the Act, especially in the light of the circumstances that led to its passage, as a complete abdication of all federal regulation of the interstate aspects of the business of insurance (R. 106–122). Such activities, the Commission held, could not be "regulated by State law" and hence remained subject to its jurisdiction by virtue of the McCarran-Ferguson Act proviso "[t]hat after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law" (R. 113). In the Commission's view (R. 120), there is "an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation 'to the extent that such business is not regulated by State law' is inoperative."

Implicit in the view of the hearing examiner, the Commission stated (R. 106), "is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. * * * We do not think that the

McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation, admits of such a construction. * * *"

The Commission further stated (R. 114, 115, 120-121):

* * * * *

> The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.
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> * * * * *
>
> * * * Congress gave the States about three years in which to define a reasonable area of State

police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. * * *

The Commission thus concluded that the mere enactment of a state law relating to advertising practices of insurance companies did not operate to oust it of jurisdiction.

The Court of Appeals decision. On respondent's petition to review, the court below set aside the Commission's order, holding that the Commission under the McCarran-Ferguson Act was without jurisdiction (*infra,* pp. 10–18).

REASONS FOR GRANTING THE WRIT

The basic question presented in this case is the same as that presented in the accompanying petition for a

writ of certiorari in *Federal Trade Commission* v. *National Casualty Company*. The facts in the two cases are quite similar, except that respondent in the instant case does not mail advertising literature directly to prospects in other states and that there is no evidence that its agents use the mails to disseminate such literature to prospects.

The reasons for granting the writ, therefore, are fully stated in the petition in the *National Casualty Company* case.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
EARL E. POLLOCK,
Assistant to the Solicitor General.

EARL W. KINTNER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
ALVIN L. BERMAN,
Attorney,
Federal Trade Commission.

SEPTEMBER 1957.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 16132

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION, SITTING AT WASHINGTON, D. C.

(April 9, 1957)

Before HUTCHESON, *Chief Judge,* and CAMERON and JONES, *Circuit Judges*

JONES, *Circuit Judge:* The petitioner, the American Hospital and Life Insurance Company, is a corporation of Texas. Its principal or home office is in San Antonio, Texas. It is engaged in the business of writing health and accident insurance. It has been licensed to do business and is doing business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma and Tennessee, as well as in the State of Texas. In each of these states the petitioner has agents through whom its business is conducted. Each of the states has statutes forbidding deceptive and mis-

leading advertising. The petitioner employed printed brochures which it sent from its home office to its agents for use in advertising and soliciting business. It did no advertising by newspapers or other periodicals or by radio or television. The Federal Trade Commission issued its complaint against the petitioner charging it with engaging in unfair and deceptive advertising practices in commerce in violation of the Federal Trade Commission Act, 15 U. S. C. A. § 41, et seq. The petitioner asserted that its advertising was not false, misleading or deceptive. It also contended that the Commission was without jurisdiction because of the McCarran Act. After a hearing the Examiner of the Commission, in an initial decision, held that the charges concerning the petitioner's advertising had not been sustained. The Examiner also held that the Commission was without jurisdiction, except as to petitioner's transactions in Mississippi where, at the time of the hearing, there was no adequate law regulating false and deceptive acts and practices. The Commission, on appeal, set aside the initial decision of the Examiner by a three to two decision. It determined that in passing the McCarran Act the Congress did not, and did not intend to, deprive the Commission of the power to regulate and control the interstate activities of insurance companies. It found the advertising brochures which had been sent from Texas to the other states were false and deceptive. It entered a Cease and Desist Order which is before us for review. In the opinion of the majority of the Commission, it was said that "there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by state law."

In the South-Eastern Underwriters case,[1] of which more will be hereafter said, Mr. Justice Black, in the majority opinion, observed that "Perhaps no modern commercial enterprise directly affects so many people as does the insurance business." Although it has not been classed as a public utility charged with the duty of serving all who may apply,[2] the business of insurance has been more generally regulated than any other sphere of business activities not a public utility.[3] It was determined in 1868 that the insurance business did not constitute transactions in commerce,[4] and this doctrine was adhered to in many subsequent decisions.[5] In 1944 came the South-Eastern case, *supra*, where, in a four to three decision, with two justices of the court not participating, it was held generally that insurance businesses are engaged in "commerce among the several states," and specifically that the Sherman Anti-Trust Act[6] applied to insurance activities. Mr. Chief Justice Stone, in his dissenting opinion, said that the action of the majority in overturning the precedents of the seventy-five years "cannot fail to be the occa-

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[1] *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440.

[2] *National Union Fire Insurance Co.* v. *Dickinson*, 128 Ark. 367, 194 S. W. 254.

[3] For a statement of the reasons for and history of the regulation of insurance see 1 Richards on Insurance, 5th Ed. 136, et seq.

[4] *Paul* v. *Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357.

[5] These were reviewed by the Supreme Court in 1913, where it was said of the prior decisions "they constitute a formidable body of authority and strongly invoke the sanction of the rule of stare decisis." *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332.

[6] 15 U. S. C. A. § 1 et seq.

sion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power raising questions which cannot be answered for years to come * * *".[7] The litigation has not yet reached the flood stage and the McCarran-Ferguson Act,[8] sometimes referred to as Public Law 15, and more often merely as the McCarran Act, has been the only national legislation of consequence resulting from the decision. This act was proposed by Senators McCarran and Ferguson and on March 9, 1945, it was signed by the President and became a law. The enactment is brief and many of its provisions are here pertinent.[9]

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[7] 322 U. S. 583.

[8] 59 Stat. 33, 15 U. S. C. A. §§ 1011–1015.

[9] "An act to express the intent of the Congress with reference to the regulation of the business of insurance.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall

The purpose and effect of the McCarran Act has been stated by the Supreme Court, it saying:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state

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be applicable to the business of insurance to the extent that such business is not regulated by State law.

"SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

"SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.

"Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342. See *North Little Rock Transp. Co.* v. *Casualty Reciprocal Exchange,* 8th Cir. 1950, 181 F. 2d 174; *American Universal Ins. Co.* v. *Sterling,* 3rd Cir. 1952, 203 F. 2d 159.

By the Act it was provided not only that the business of insurance should be subjected to regulation by the States, but that until June 30, 1948,[10] the Sherman Act, the Clayton Act and the Robinson-Patman Act should not apply to the business of insurance, and after that date the Sherman and Clayton Acts and the Federal Trade Commission Act should apply to such business to the extent it is not regulated by State law. It is also provided that nothing contained in the Act shall render the Sherman Act inapplicable to any

[10] The moratorium, intended to permit the States to enact regulatory measures if the laws were inadequate for the purpose, was extended from January 1, 1948, to June 30, 1948, by Act July 25, 1947, c. 326, 61 Stat. 448.

agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation. Then too it was provided that the Act should not affect the application of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act to the business of insurance. These provisions evidence a design on the part of Congress to yield to the States which had undertaken, or which would undertake, to regulate the insurance business in those fields in which the Sherman Act might otherwise have been applicable, with the exception of boycotts, coercion and intimidation. Such was the intent of the Congress. Senator McCarran, in response to the query of a colleague, said:

> "The Senator will recall the Southeastern Underwriters case. The decision was startling. It created consternation in the insurance business because by previous decisions rendered during the past 50 years or more we were entitled to believe that the business of insurance was not to be classified as interstate commerce. The Supreme Court of the United States specifically, directly, and emphatically put it into the category of interstate commerce. It put it squarely under the Sherman Act, the Clayton Act, and other Acts. The pending bill is for the purpose of creating a moratorium for 3 years in order that the business of insurance shall not be interfered with by any Federal power under either the Clayton Act or the Sherman Act. So during the period of moratorium the various states themselves may take steps to regulate the business of insurance."

Senator McCarran again said: "The moratorium would not be continued; but if in the meantime the states themselves had regulated the business of insur-

ance, the Sherman and Clayton Acts and the other Acts would not be effective."

The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. The Supreme Court, we think, has expressed the same view in holding, with respect to another phase of state insurance regulation,

> "These regulations can not be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business." *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777.

If there is an "irreducible area" of Commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it.

The Commission relied heavily upon *United States* v. *Sylvanus*[11] in support of its jurisdiction. An indictment was returned, in the Sylvanus case, for use of the mails to defraud in the sale of insurance by

[11] 7th Cir. 1951, 192 F. 2d 96.

mail. The McCarran Act was held to be no bar to prosecution. A fraudulent scheme carried on by use of the mails would violate the mail fraud acts even though the mails never crossed a state boundary.[12] The doctrine of the case, with the decision on which we have no disagreement, is of no bearing on the problem before us here. A violation of the postal laws does not of itself confer jurisdiction on the Federal Trade Commission.

The Commission's Examiner found that each of the States in which the petitioner did business, except Mississippi, had enacted laws for the regulation of false and deceptive advertising. Mississippi enacted such a law while the matter was pending before the Commission. This is not controverted. The Examiner found that the petitioner's advertising matter was not false, misleading or deceptive. Holding, as we do, that the Commission was without jurisdiction, we do not reach the merits.

The order of the Commission is set aside and

Reversed.

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[12] See *New York Life Insurance Co.* v. *Deer Lodge County*, *supra*.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

JUDGMENT

Extract from the Minutes of April 9, 1957

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

v.

FEDERAL TRADE COMMISSION

This cause came on to be heard on the petition of The American Hospital and Life Insurance Company for review of an Order of the Federal Trade Commission issued on April 24, 1956, in Docket No. 6237, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, set aside and reversed.

APPENDIX C

In the Supreme Court of the United States

No. —, October Term, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1957.

(Sgd.) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of June 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

Office - Supreme Court, U.S.
FILED
SEP 26 1957
JOHN T. FEY, Clerk

No. 436

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

FEDERAL TRADE COMMISSION,
PETITIONER,

vs.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief for Respondent in Opposition

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Attorneys for The American Hospital and Life Insurance Company, Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

FEDERAL TRADE COMMISSION,
PETITIONER,

VS.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief for Respondent in Opposition

The Respondent, The American Hospital and Life Insurance Company, asserts that the decision of the Court of Appeals for the Fifth Circuit is correct, that the Supreme Court of the United States has already fully construed the McCarran Act insofar as is necessary in relation to the facts in this case and that there is no reason for granting of writ of certiorari in this case.

Question Presented

As far as this case is concerned the statement of the question presented, on page 2 of the petition, is

entirely too broad. Petitioner says that the question presented is whether the McCarran-Ferguson Act is to be construed as divesting the Commission of jurisdiction over false and misleading advertising in connection with the interstate sale of insurance because of the mere enactment of State laws prohibiting such practices within the boundaries of the State involved. The only question presented in this case for consideration by the Supreme Court is the narrow question of whether the Federal Trade Commission has jurisdiction of a complaint charging as deceptive, matter transmitted by the home office to agents in the several States and distributed by agents licensed to do business in a particular State, such agent never crossing a State line nor sending any of such matter across a State line, when in each of such States a completely adequate regulatory law has been passed giving the State full and complete power to control the acts of the agent and company in each respective State, the agent's and company's activity in reference to such matter complained of being absolutely confined within the boundaries of such State.

On page 4 of the petition Petitioner comments on the fact that an application for a policy is sent through the mail to the home office in Texas and that the policy is mailed by Respondent to the agent in the other State for delivery to the purchaser. Nowhere in the complaint is it charged that there was any deception connected with this interstate transaction; the

only charge is that the brochures sent by the home office to agents in other States and distributed by such agents only within the confines of the State in which the respective agent had authority to act contained deceptive matter.

In no instance was any of the matter complained of sent by the home office directly to a prospect. (Official Report of Proceedings before Federal Trade Commission, pages 266-7)

Respondent has done no advertising by newspaper, magazine, radio or television. (Official Report of Proceedings before Federal Trade Commission, pages 112-4) The Court of Appeals so found: "It did no advertising by newspapers or other periodicals or by radio or television." (Exhibit "A", Petition for Writ, page 11).

Petitioner throughout is making the obvious attempt to have this case considered by the Supreme Court on the facts in the National Casualty Co. case rather than on the facts in this case.

The judgment in this case was entered by the Court of Appeals for the 5th Circuit on April 9, 1957. The judgment of the Court of Appeals for the 6th Circuit in the National Casualty Co. case was not entered until June 6, 1957.

In the National Casualty Co. petition it is stated as a fact that some of the advertising material is dis-

seminated directly from the home office to the public and that the Examiner held that the Commission had jurisdiction to proscribe deceptive and misleading representations made by National Casualty Co. and disseminated directly by mail to prospective purchasers in the several States. There are no such facts in The American Hospital and Life Insurance Company case.

It is obvious that it might not be practicable for the State of Arkansas to control the mailing of matter from San Antonio, Texas, to citizens living in Arkansas, but the State of Arkansas has adequate and complete power to control the distribution of matter by an agent in Arkansas to citizens also living in Arkansas, and this is the only way that the advertising matter of The American Hospital and Life Insurance Company is distributed.

In its obvious attempt to seek to have The American Hospital and Life Insurance Company case decided on the facts of the National Casualty Co. case much of the matter presented in The American Hospital and Life Insurance Company petition is merely by reference to the National Casualty Co. petition, a case decided two months later.

Even the opinion of the Federal Trade Commissi in The American Hospital and Life Insurance Company case is set out as Appendix "D" to the National Casualty Co. petition rather than being set out as appendix to the petition in The American Hospital

and Life Insurance Company case. Respondent asserts that the petition in this case should be considered solely on the narrow facts in this case and that Petitioner's obvious effort to have it considered on the less favorable facts in the National Casualty Co. case is entirely inappropriate.

ARGUMENT

Respondent has never taken the position that the proviso set out in Section 2(b) of the McCarran Act is meaningless. It states plainly that the Federal Trade Commission Act shall be applicable to the business of insurance **to the extent that such business is not regulated by State Law.** Respondent has always asserted, and now asserts, that the control and regulation of the matter complained of in the Federal Trade Commission's complaint in this case is completely, adequately and effectively regulated by the State law in every State in which Respondent does business. The only distribution or dissemination of the matter complained of is wholly within the confines of the State in which the agent operates and is delivered solely to persons within such State. The agents who disseminate and distribute the matter are licensed by the Insurance Commission in the State in which they reside and in which they operate. They never cross a State line with the matter complained of nor do they ever send any of the matter complained of across a State line.

Under each of the State laws the Insurance Commission has all of the powers to control the agents within that State and to control the Respondent receiving a permit to do business in that State.

There is set out as Appendix "A" to this brief the full text of Arkansas's regulatory statute and, as stated by Petitioner in footnote 3, page 5, all of the States in which Respondent does business have identical or substantially identical or comparable statutes. Under all of these statutes the Insurance Commissioner is given the same broad powers over false and deceptive advertising matter as is given to the Federal Trade Commission by the Federal statute, including the power to issue cease and desist orders. Additionally, each State has the power to revoke the licenses of agents and to revoke the permit to insurance companies to do business within the State.

As the only distribution of the matter complained of is distribution wholly within the confines of the State by agents whose license may be revoked by the Insurance Commissioner at any time, these agents representing an insurance company whose permit to do business in the State may also be revoked at any time, with both the agents and the insurance company subject to process within the State and upon whom completely enforcible cease and desist order may be served at any time, Respondent submits that the matter complained of in the Federal Trade Commission's

complaint in this case is subject to complete, adequate and effective control at all times by every State in which Respondent does business.

In reference to newspaper and magazine advertising, and radio and television advertising, it might be contended that Arkansas's control of newspaper and magazine advertising published in newspapers and magazines which were transmitted through the United States mail to residents of the State of Arkansas, could not be effectively prevented by the State of Arkansas, and it might be contended that radio and television advertising put on the air in San Antonio, Texas, and being heard or seen by people residing in the State of Arkansas, could not be effectively controlled by the Insurance Commissioner of the State of Arkansas. On the other hand, it might be argued that even as to this type of advertising, as the State of Arkansas would have the power to cancel Respondent's permit to do business in Arkansas, and revoke the licenses of its agents there, that this would be an effective means of regulating either newspaper, magazine, radio or television advertising, but as Respondent engages in absolutely none of these types of advertising and as no such charge was contained in the complaint of the Federal Trade Commission, those questions are in no way in the case and Respondent respectfully submits that petitioner's conjecture as to whether these types of advertising are subject to State

control has no place whatever in the consideration of this case.

INSOFAR AS THIS CASE IS CONCERNED THE QUESTION PRESENTED HAS BEEN SETTLED BY THE DECISIONS OF THE SUPREME COURT.

Obviously the only basis on which the Petitioner could properly seek a writ of certiorari in this case would be on the premise that the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court.

Respondent submits that its position that the Federal Trade Commission's jurisdiction as to the business of insurance extends only to the extent that such business is not regulated by State law is fully upheld by the opinion of the Supreme Court in Prudential Insurance Co. vs. Benjamin, 328 U.S. 408.

It is true that the Prudential case arose during the moratorium and it is also true that the Prudential case had to do with taxation rather than regulation. Respondent submits, however, that the pronouncements of the Court in the Prudential case are just as pertinent subsequent to the moratorium as they were during its pendency because the language of the Act is perfectly clear that after the moratorium the Federal Trade Commission will have jurisdiction only "to the

extent that such business is not regulated by State law."

It is entirely conceivable that in a case involving newspaper, magazine, radio or television advertising that there might be an area in which the Supreme Court would deem it appropriate to make pronouncements, but Respondent respectfully submits that in this case where the undisputed evidence conclusively establishes that States under the provisions of their regulatory laws have the power completely to control every act of Respondent included in the Commission's complaint in this case, that there is no occasion for time of the Supreme Court to be consumed merely to reiterate the principles announced by it in the Prudential case, 328 U.S. 408, Wilburn Boat Co. case, 348 U.S. 310, Robertson vs. California, 320 U.S. 440, and Maryland Casualty Co. case, 347 U.S. 409.

WHEREFORE, Respondent prays that petition for certiorari in this case be denied.

Dated September 20, 1957.

Respectfully submitted,

J. D. WHEELER

Attorney for The American Hospital and Life Insurance Company, Respondent.

Of Counsel:
BOYLE, WHEELER, GRESHAM, DAVIS AND GREGORY
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APPENDIX "A"

ARKANSAS

UNFAIR TRADE PRACTICES

§ 186. (66-1701). Declaration of purpose.—The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress [ch. 20, 59 U. S. Stat. at Large 33]), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. § 1, Act 303 of 1949.

§ 187. (66-1702). Definitions. — When used in this Act:

(a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

(b) "Commissioner" shall mean the Insurance Commissioner of this State. Id. § 2.

§ 188. (66-1703). Unfair methods of competition or unfair and deceptive acts or practices prohibited.—No person shall engage in this State in any trade

practice which is defined in this Act as, or determined pursuant to this Act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. Id. § 3.

§ 189. (66-1704).—Unfair methods of competition and unfair or deceptive acts or practices defined. —The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.

(1) MISREPRESENTATION AND FALSE ADVERTISING OF POLICY CONTRACTS. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) FALSE INFORMATION AND ADVERTISING GENERALLY. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) DEFAMATION. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is circulated to injure any person engaged in the business of insurance.

(4) BOYCOTT, COERCION AND INTIMIDATION. Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) FALSE FINANCIAL STATEMENTS. Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) STOCK OPERATIONS AND ADVISORY BOARD CONTRACTS. Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or any advisory board contract promising returns and profits as an inducement to insurance.

(7) UNFAIR DISCRIMINATION. (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life

in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) REBATES. (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance

company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(b) Nothing in Clause 7 or paragraph (a) of Clause 8 of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) in the case of any contract of life insurance or life annuity, paying bonuses to policy-holders or otherwise abating their premiums in whole or in part out of surplus accumulated from non-participating insurance, provided that any such bonuses, or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year. Id. § 4.

§ 190. (66-1705). Power of commissioner.—The Commissioner shall have power to examine and in-

vestigate into the affairs of every person engaged in the business of insurance in this State in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section 188 of this digest. Id. § 5.

§ 191. (66-1706). Hearings—Production of books—Service of process.—(a) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this State in any unfair method of competition or any unfair or deceptive act or practice defined in section 189 of this digest, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 10 days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the Commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the Commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this Act shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The Commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The Commissioner, upon hearing, may, and upon request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the Commissioner shall prepare a statement of the evidence and proceedings for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the Chancery Court of Pulaski County, on application of the Commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and other processes of the Commissioner under this Act may be served by anyone duly authorized by the Com-

missioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service shall be proof of the same, and the return postcard receipt for such statement, notice, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same. Id. § 6.

§ 192. (66-1707). Cease and desist orders and modifications thereof.—If, after such hearing the Commissioner shall determine that the method of competition or the act or practice in question is defined in Section 4 (§ 189) and that the person complained of has engaged in such method of competition, act or practice in violation of this Act, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under Section 8 (a) (§ 193) for filing a petition for review (by appeal or writ of certiorari) if no such petition has been duly filed within such time or, if a

petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the Chancery Court, as hereinafter provided, the Commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the Commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require. Id. § 7.

§ 193. (66-1708). Judicial review of cease and desist orders.—(a) Any person required by an order of the Commissioner under Section 7 (§ 192) to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in Section 4 (§ 189) may obtain a review of such order by filing in the Chancery Court of Pulaski County, within 30 days from the date of the service of such order, a written petition praying that the order of the Commissioner be set aside. A copy of such petition shall be forthwith served upon the Commissioner, and thereupon the Commissioner forthwith shall certify

and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the Commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the Commissioner, in whole or in part. The findings of the Commissioner as to the facts, if supported by substantial evidence, shall be conclusive.

(b) To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the preceeding before the Commissioner, the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact, or make new findings by reason of the

additional evidence so taken, and he shall file such modified or new findings which, if supported by substantial evidence shall be conclusive, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the Commissioner under Section 7 (§ 192) shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time, except that the Commissioner may thereafter modify or set aside his order the extent provided in Section 7 (§ 192) (b); or

(2) Upon the final decision of the court if the court directs that the order of the Commissioner be affirmed or the petition for review dismissed.

(d) No order of the Commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State. Id. § 8.

§ 194. (66-1709). Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.—(a) Whenever the Commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this State in any method of competition or in any act

or practice in the conduct of such business which is not defined in Section 4 [§ 66-1704], that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 10 days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in Section 6 (§ 191). The Commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this Act and if such method of competition, act or practice has not been discontinued, the Commissioner may, through the Attorney General of this State, at any time after 20 days after the service of such report cause a petition to be filed in the Chancery Court of this State within the district wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary

in its judgment to prevent injury to the public pendente lite.

(c) A transcript of the proceedings before the Commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the Commissioner with respect thereto is to the interest of the public and that the findings of the Commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice. Id. § 9..

§ 195. (66-1710). Judicial review by intervenor.—If the report of the Commissioner does not charge a violation of this Act, then any intervenor in the proceedings may within 30 days after the service of such report, cause a notice of appeal or petition for writ of certiorari to be filed in the Chancery Court of Pulaski County for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which finds, notwithstanding such report of the Commissioner, constitutes a violation of this Act. Id. § 10.

§ 196. (66-1711). Penalty.—Any person who violates a cease and desist order of the Commissioner under Section 7 (§ 192), after it has become final, and while such order is in effect, shall upon proof thereof to the satisfaction of the court, forfeit and pay to the State of Arkansas a sum not to exceed $50, which may be recovered in a civil action, except that, if such violation is found to be willful, the amount of such penalty shall be a sum not to exceed $500. Id. § 11.

§ 197. (66-1712). Provisions of act additional to existing law.—The powers vested in the Commissioner by this Act, shall be additional to any other powers to enforce any penalties, fines or forfeitures author-

ized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive. Id. § 12.

§ 198. (66-1713). Immunity from prosecution.— If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall not withstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissable against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the Insurance Law of this State. Any such individual may execute, acknowledge and file in the office of the Commissioner a statement

expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced. Id. § 13.

Note: Section 15 of the above act states that same is cumulative and does not repeal or modify unfair practice acts dealing with other lines of business.

The laws of Arizona, Insurance Code, Chapter 64, Art. 21, Sections 1 to 21; of Colorado, Colorado Revised Statutes, Chapter 72, Article 15, Sections 1 through 16; of Indiana, Barnes Indiana Statutes, Title 39, Chapter 53, Sections 39-5301 to 39-5318; of Kansas, Chap. 40, Secs. 40-2401 through 40-2413, Kansas Insurance Code; of Kentucky, Article 28, Sections 304-924 to 304-945, Revised Statutes; of Louisiana, Title 22, Sections 1211 to 1217, as amended; of Mississippi, House Bill No. 145, effective as of February 29, 1956; of New Mexico, Insurance Laws of New Mexico, 1951, Sections 60-712 to 60-722; of Oklahoma, Oklahoma statutes, 1955 Supplement, Title 36, Sec. 117.1 to 117.1-14; also shown 1955 Supplement to Oklahoma Insurance Laws, Sec. 79(a) (sub-section A to N) to Sec. 79(i); of Tennessee, Article XIX, Sections 6459.56 to 6159.64; all are substantially identical with

the laws of Arizona above set out, and all, with the exception of the laws of Mississippi, are set out in Commission's Exhibit No. 58 which has been sent up as a part of the record. A certified copy of the laws of the State of Mississippi was made a part of the record by Order entered by the Federal Trade Commission May 11, 1956. (R. 161)

ILLINOIS

Smith-Hurd Illinois Annotated Statutes, Chapter 73, Sections 761 to 1013.

ILLINOIS

PERTINENT INSURANCE STATUTES

Smith-Hurd Ill. Annotated Statutes, Chapter 73, Sec. 761

"Misrepresentation and Defamation Prohibited. [1] No company doing business in this State, and no officer, director, agent, clerk or employee thereof, broker, or any other person, shall make, issue or circulate or cause or knowingly permit to be made, issued or circulated any estimate, illustration, circular, or verbal or written statement of any sort misrepresenting the terms of any policy issued or to be issued by it or any other company or the benefits or advantages promised thereby. . ."

"(4) Any company, officer, director, agent, clerk or employee thereof, broker, or other person who violates any of the provisions of this section, or knowingly participates in or abets such violation, shall be required to pay a penalty of not less than one hundred dollars, nor more than one thousand dollars, to be recovered in the name of the People of the State of Illinois by the State's Attorney of the county in which the violation occurs and the penalty so recovered shall be paid into the county treasury."

"(5) No company shall be held guilty of having violated any of the provisions of this section by reason of the act of any agent, solicitor or employee, not an officer, director or department head thereof, unless an officer, director or department head of such company shall have knowingly permitted such act or shall have had prior knowledge thereof."

Chapter 73, Section 1013: "The Director is charged with the rights, powers and duties appertaining to the enforcement and execution of all the insurance laws of this State. He shall have the power

(a) to make reasonable rules and regulations as may be necessary for making effective such laws;

(b) to conduct such investigations as may be necessary to determine whether any person has violated any provision of such insurance laws; and

(c) to conduct such examinations, investigations

and hearings in addition to those specifically provided for, as may be necessary and proper for the efficient administration of the insurance laws of this State."

MISSOURI

Revised Statutes of Missouri, 1949, Chapter 376, Sections 376.590 and 376.600.

CHAPTER 376

LIFE AND ACCIDENT INSURANCE FROM THE REVISED STATUTES OF MISSOURI, 1949

376.590. Misrepresentations, false estimates and circulars prohibited—agents—notes to be held until policy delivered.

1. No life insurance company doing business in this state, and no officer, director, or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof.

2. Any person who shall solicit an application for insurance upon the life of another shall, in any

controversy between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company and not the agent of the assured, nor shall any life insurance company or agent sell, discount or otherwise dispose of any note or notes taken for payment of life insurance premium or premiums, before delivering to the applicant, in person, the policy for which said note or notes shall have been given. (5844)

376.600 Penalty for violating Section 376.590.

Any life insurance company which may violate any of the provisions of section 376.590, or which may permit any of its agents or representatives in this state to violate said provisions, shall have its certificate of authority or license to transact business in Missouri revoked by the state superintendent of insurance, and shall be for a period of five years barred from the further transaction of business in this state; and any agent, solicitor or representative in this state of any such insurance company who shall violate any of the provisions of said section shall be deemed guilty of a misdemeanor, and, on conviction thereof, in any court of competent jurisdiction in this state, shall be fined not less than fifty nor more than five hundred dollars for each such offense or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment. (5845)

Section 375.230, Revised Statutes of Missouri, reads, in part, as follows:

"**Expulsion of foreign companies.**—Whenever it shall appear to the superintendent of the insurance division, from an examination made by himself, or from the report of the person or persons appointed by him, or from the statements of the company, that the affairs of any insurance company not incorporated by the laws of this state, and doing in this state any business mentioned in this chapter, are in an unsound condition, or that such company is insolvent, or that its capital or fund is impaired, or whenever, from any knowledge or information in his possession, such superintendent has reasonable cause to suspect that the further continuance by said company in business is hazardous to the public or to those holding its policies, the superintendent may suspend or revoke the certificate of authority granted to such company . . ."

Section 561.660, Title 28, Revised Statutes of Missouri reads as follows:

"**Publication of untrue, misleading or deceptive advertisements—Penalty**—1. Any person, firm, corporation, or association who, with intent to sell or in any wise dispose of merchandise, securities, **service, or anything offered** by such person, firm, corporation, or association, dir. .ly or indirectly, to the public for sale or distribution or with intent to increase the consumption thereof **or to induce the public in any manner**

to enter into any obligation relating thereto or to acquire title thereto or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to public, which advertisement contains any assertion, representation, or statement of fact which is untrue, **deceptive, or misleading,** shall be guilty of a misdemeanor.

2. And shall upon conviction thereof be punished by a fine or not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or by both such fine and imprisonment: providing that anything herein shall apply to any proprietor or publisher of any newspaper or magazine which publishes, disseminates, or circulates any such advertisement without the knowledge of the unlawful or untruthful nature of such advertisement." (Emphasis supplied.)

Office - Supreme Court, U.S.
FILED
APR 2 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 436

FEDERAL TRADE COMMISSION,
PETITIONER,

vs.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief For The American Hospital And Life Insurance Company

J. D. WHEELER,
Attorney

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Brief For The American Hospital And Life Insurance Company

STATEMENT

In addition to the facts set out on pages 11 and 12 of Petitioner's brief, it is appropriate to state that no issue is made by Petitioner of the fact that the acts complained of in this case consist solely of the presentation within the boundaries of a State to prospects within that particular State by an agent

who has a license in that particular State. There is no instance of an agent crossing State lines in order to make such face to face presentation to a prospect. Neither is any issue made by Petitioner of the fact that Respondent sends no advertising by mail to prospects, does no newspaper, magazine, radio or television advertising.

SUMMARY OF ARGUMENT

1. In the McCarran-Ferguson Act the word "regulation" is used in its ordinary sense and is synonymous to "control."

2. The McCarran-Ferguson Act vests the exclusive regulation and control of the insurance business in the several States.

3. As to the business of insurance the jurisdiction of the Federal Trade Commission is restricted to such area of such business as is not regulated by State law.

4. Under the McCarran-Ferguson Act the power of the State to regulate the business of insurance comes into being by the enactment of the regulatory State law, and such power is not suspended during the interim between the enactment of the State law and the enforcement of such law, nor is it dependent upon the extent to which such State law is actually enforced. If such State laws are not enforced to the satisfaction of the Congress, the Congress has the

power at any time to occupy the field and vest the regulatory power in a Federal agency to the exclusion of regulation by the several States.

IN THE McCARRAN-FERGUSON ACT THE WORD "REGULATION" IS USED IN ITS ORDINARY SENSE AND IS SYNONYMOUS TO "CONTROL".

Respondent wishes to emphasize at the outset that both in **Southeastern** and in the McCarran-Ferguson Act the word "regulation" is used in its ordinary sense and is synonymous to the word "control". The word "regulate" is defined in Webster's New International Dictionary "To govern or direct according to rule as laws which regulate the succession of seasons; more narrowly to bring under the control of law or constituted authority."

The first two sentences of this Court's opinion in Southeastern are:

> "For 75 years this Court has held whenever the question has been presented, that the commerce clause of the Constitution does not deprive the individual States of the power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each State has been held to have this power even though negotiations and execution of the companies' policy contracts involve communications of information of persons, monies and papers across State lines."

Throughout the decision it is made plain that during such 75 years the control by the States of insurance business was exclusive and absolute unless some phase of such business violated some other portion of the Constitution than the commerce clause. The entire context of the McCarran-Ferguson Act clearly manifests that it was the intent of the Congress to continue such regulation (control) of the business of insurance by the several States as that business had been controlled prior to Southeastern. It is first stated:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Section 2-a. The business of insurance and every person engaged therein shall be **subject to the laws** of the several States which relate to the regulation or taxation of such business." (Emphasis ours)

It is too plain for argument that when anyone is subject to the laws of the several States that one is **controlled** by such laws.

> "Section 2-b. No Act of Congress shall be construed to invalidate, impair or supersede any laws enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance."

Then follows the proviso which we quote insofar as it is pertinent to this case:

> "The Federal Trade Commission Act as amended shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Respondent submits that the clear meaning of such proviso is "the Federal Trade Commission Act as amended shall be applicable to the business of insurance **only** to the extent that such business is not **controlled** by State law."

THE McCARRAN-FERGUSON ACT VESTS THE EXCLUSIVE REGULATION AND CONTROL OF THE INSURANCE BUSINESS IN THE SEVERAL STATES.

With all due respect to counsel for Petitioner, Respondent does not hesitate to assert that Petitioner's position throughout its brief upon which it must stand or fall, that Congress intended a joint control of advertising by the Federal Trade Commission and the Insurance Commissioners of the 48 States is completely fallacious.

Even within the Commission itself there were sharply diverse conclusions as to the advertising complained of in this case. The Trial Examiner, after holding an extensive hearing on the matter, reached this conclusion:

> "The allegations of the complaint charging the Respondent with making false and mis-

leading statements and misrepresentations with respect to the terms and conditions of its policies in general, or with respect to the terms and conditions of specific policies, have not been established by substantial reliable probative evidence. Accordingly it cannot be found that the Respondent has violated the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in commerce to the prejudice and injury of the public. Therefore

"It is Ordered that the complaint herein be and the same is hereby dismissed." (R. page 58)

On appeal to itself from this order of dismissal the Federal Trade Commission found:

"The aforesaid acts or practices of Respondent as above set forth are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act." (R. page 67)

It is certainly conceivable that the State Insurance Commissioners would agree with the conclusions of the Hearing Examiner rather than the contrary conclusions reached by the Commission. Petitioner takes the unique position that inasmuch as the Federal Trade Commission Act and the Acts of the Legislatures of the several States on the same subject are substantially the same, that on issues of fact as to whether certain material constitutes false and deceptive advertising the Commissioners of the 48 States and the Federal Trade Commission would always

reach the same conclusion. Petitioner's position certainly does not coincide with the obviously correct statement of this Court in **Prudential vs Benjamin** in which this Court, after setting out the obvious purpose of Congress in broadly giving support to the existing and future State systems for regulating and taxing the business of insurance, stated:

> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of the State systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted."

AS TO THE BUSINESS OF INSURANCE THE JURISDICTION OF THE FEDERAL TRADE COMMISSION IS RESTRICTED TO SUCH AREA OF SUCH BUSINESS AS IS NOT REGULATED BY STATE LAW.

Respondent's position is that Petitioner's jurisdiction over the regulation of the business of insurance is residuary and is restricted to such phase of the business, if any, that is not regulated by State law. As Respondent understands it, it is only incumbent upon Respondent to show to the satisfaction of this Court that under the McCarran-Ferguson Act Petitioner has no jurisdiction of the matter complained of by Petitioner in this case. It is not incumbent upon Respondent to establish that there are no types of advertising over which Petitioner might have jurisdiction.

No issue is made by the Petitioner of the fact that the acts complained of in this case consist solely of the presentation within the boundaries of a State to prospects within that particular State by the agent who has a license in that particular State. That there is no instance of an agent crossing a State line in order to make such face to face presentation to a prospect. Neither is any issue made by Petitioner of the fact that Respondent does no mail advertising to prospects or of the fact that Respondent does no newspaper, radio, television or magazine advertising. Therefore, we do not have any question in this case of radio or television advertising going out from the home office in San Antonio and being heard and seen by those who reside in other States in which Respondent does business with the resulting question as to whether these other States could prevent broadcasts from being made in San Antonio. Nor do we have any question of advertising being sent from San Antonio, Texas, to prospects in the other States with the resulting question as to whether these other States could prevent such mailed matter from being deposited in the mail in San Antonio, Texas, addressed to persons in the other States, nor do we have any newspaper or magazine advertising originating from copy supplied in San Antonio, Texas, with such newspapers and magazines reaching those residing in other States and being read by them with the resulting question as to whether these other States could prevent such copy from being promulgated from San

Antonio, Texas, and transmitted through the United States mails to be read by people residing in other States. Nowhere in the complaint is there any charge or even intimation that Respondent is threatening or intends to engage in any mail, radio, television, newspaper or magazine advertising in the future. The Petitioner charges only in paragraph 2 of its complaint, that in the States in which Respondent does business "the business of insurance is not regulated by State law to the extent of regulating the practices of Respondent alleged in this complaint to be illegal." (R. page 6)

As Respondent sees it the sole question in this case is whether the State laws in the various States in which Respondent does business adequately and effectively regulate the acts of Respondent.

UNDER THE McCARRAN-FERGUSON ACT THE POWER OF THE STATE TO REGULATE THE BUSINESS OF INSURANCE COMES INTO BEING BY THE ENACTMENT OF THE REGULATORY STATE LAW, AND SUCH POWER IS NOT SUSPENDED DURING THE INTERIM BETWEEN THE ENACTMENT OF THE STATE LAW AND THE ENFORCEMENT OF SUCH LAW, NOR IS IT DEPENDENT UPON THE EXTENT TO WHICH SUCH STATE LAW IS ACTUALLY ENFORCED. IF SUCH STATE LAWS ARE NOT ENFORCED TO THE SATISFACTION OF THE CONGRESS, THE CONGRESS HAS THE POWER AT ANY

TIME TO OCCUPY THE FIELD AND VEST THE REGULATORY POWER IN A FEDERAL AGENCY TO THE EXCLUSION OF REGULATION BY THE SEVERAL STATES.

Respondent submits that the plain language of the McCarran-Ferguson Act, including the positive expression of the Congressional intent, sustains the soundness of the above proposition. First, there is the positive statement that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to such regulation or taxation. Second, that the business of insurance and every person engaged therein shall be subject to the laws of the several States. Third, that no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act of Congress specifically relates to the business of insurance. And, finally, that the Federal Trade Commission Act shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

It is obvious that Congress throughout was referring to legislative acts of the States and was not limiting or measuring the power of the States by the perfection with which such laws would be enforced. Petitioner throughout its brief takes the position that there is no regulation of the business by the States

except to the extent that the States enforce their regulatory laws.

Respondent submits that not only is such position unsound but it would be completely impracticable to apply or carry out the position taken. Petitioner throughout its brief admits that it has no jurisdiction if the State laws are effectively enforced. Who would determine whether the State laws were or were not effectively enforced? Would it be within the power of the Petitioner to determine its jurisdiction by determining that California, for instance, was not effectively enforcing its regulatory statute? Or would the courts of California have the power to oust the jurisdiction of Petitioner upon the ground that according to the opinion of the Supreme Court of California the State regulatory law was being effectively enforced. Or, in a particular case, after the Petitioner had assumed jurisdiction upon the ground that the State of California was not effectively enforcing its regulatory statute suppose the State of California during the pendency of the case began more vigorously to enforce its regulatory statute. The jurisdiction of Petitioner is not determined as of the filing of a complaint or as of the hearing thereon, but is measured as of the date of entering its final order. [**United Corporation vs Federal Trade Commission,** (1940), 110 Fed. (2) 473; **Chamber of Commerce of Minneapolis vs Federal Trade Commission,** (1926), 13 Fed. (2) 673] Would Petitioner have the power to determine whether the more vigorous enforcement by the

State of California of its regulatory statute had ousted its jurisdiction which it had assumed with the filing of the complaint?

If Petitioner's position is sound it is conceivable that in every case before it there would be the issue of jurisdiction not based on any rule of law but based on the issue of fact as to whether the State regulatory statutes were being effectively enforced.

In a footnote, page 11 Petitioner's brief, it is stated that 36 States have enacted the Model Bill relating to insurance, that 8 others had statutes essentially the same in effect as the Model Bill. Since that time Mississippi has enacted the Model Bill. So, there are at least 45 States which have enacted adequate regulatory statutes.

Suppose Petitioner filed a complaint against an insurance company which was doing business in all of these 45 States and Petitioner charged that such insurance company was guilty of fraudulent and deceptive advertising. If Petitioner's position is sound that it has jurisdiction unless the State is effectively enforcing its statute, the issue of fact would be raised as to each of the 45 States, and the validity of Petitioner's cease and desist order would be dependent upon how this issue of fact as to each State were finally determined. This issue of fact would have to be determined in every case in which Petitioner filed a complaint and the number of issues of fact to be determined would depend on the number of States

in which the Respondent was doing business. And in every case as to every State, after Petitioner had assumed jurisdiction, such jurisdiction would be subject to be ousted if it could be shown that since the complaint was filed certain States had become more vigorous in the enforcement of their statutes.

It seems to Respondent that it is too plain for argument that Congress never intended to make the power of the several States to regulate the business of insurance dependent upon the Federal Trade Commission's determination of the extent to which the several States were enforcing their regulatory statutes.

Respondent submits that the Congress and not the Federal Trade Commission is vested with the power to determine whether the State regulation of the business of insurance is adequate and effective.

In the report of the Senate Committee on the Judiciary, this brief infra, page 31, the Committee expresses the opinion that considerable study should be given of the question of need, if any, of further Federal legislation. More than ten years have passed since such report and there has been no further Federal legislation on the subject. Respondent submits that this indicates that Congress is satisfied with the regulation by the several States.

Now, replying specifically to certain portions of Petitioner's argument.

Under A, Petitioner's brief, page 22, Petitioner states:

"Nor is the Commission proceeding against insurance advertising which has been approved formally or informally by State authorities. **** And no one has even intimated that any of the States actually had applied its regulatory statute to the advertising practices of the two companies involved here." (Brief, page 22)

In the official report of the proceedings before the Federal Trade Commission, page 116, appears the following brought out by the attorneys for Petitioner from the witness W. C. Murphy:

"Q. Now, has such advertising been approved by the Insurance Commissioners of the various states?

"A. Yes, sir, where the regulations are such.

"Q. Has such advertising been submitted to the Commissioners of all states where you do business?

"A. Well, I would say yes; there are some states that won't look at it, that is, they don't have any particular —

"Q. Which states are those?

"A. I don't recall offhand. A copy of our application must be submitted and all this sales literature, a copy of it in all cases must be submitted to the states and approved and, if we get a kickback on some of our advertising, then we change it.

"Q. Now, do you know what advertising that was?

"A. No, I don't.

"Q. But, that has happened?

"A. Yes, sir. It was not actually a kickback, or criticism; it was just for clarification.

"Q. Well, asking you to change it.

"A. Well, maybe so." (Official Report 116-117)

Respondent did not ask that this testimony be included in the printed record because Respondent did not contemplate that Petitioner would make statements directly contrary to evidence which Petitioner itself developed.

Petitioner admits in its brief, at the top of page 23, that the Federal Trade Commission Act cannot be applied so as to override the state policy specifically expressed either in statutes or **administrative action.** How, then, can the Federal Trade Commission enter a cease and desist order as to advertising when the State in exercising its administrative action conceivably might reach the conclusion that the identical advertising sought to be prohibited by the Commission's cease and desist order was neither false, deceptive nor misleading?

Under B, page 23 of Petitioner's brief, and throughout the brief, Petitioner takes the position that in the absence of Federal regulation to fill the void there is a legal vacuum, a "no man's land" which is not effectively regulated either by the States or by the Federal government.

Respondent submits that the McCarran-Ferguson Act leaves no void, no legal vacuum, nor is there any "no man's land". The so-called Model Codes adopted by the States, one of which is set out as the Appendix

to Petitioner's brief, occupies the same field insofar as the business of insurance is concerned as that occupied by the Federal Trade Commission as to commerce in general, except that the State acts are much fuller and more in detail and leave much less to judicial construction than does the Federal Trade Commission Act. The McCarran-Ferguson Act makes the Federal Trade Commission Act applicable to the business of insurance only to the extent that such business is not regulated by State law. All of the States in which Respondent does business having enacted effective regulatory acts, there can be no void, no legal vacuum or "no man's land" insofar as this case is concerned.

In spite of the fact that this case and No. 435 have been consolidated for argument this case will, of course, be decided upon the record in this particular case. It is undisputed that all of the advertising matter complained of is sent from the home office in San Antonio, Texas, directly to agents in the several States in which Respondent is licensed to transact business. Each of the agents who receives the advertising matter is licensed to act as agent only in the State in which he resides. He never crosses State lines in presenting the advertising matter to prospects. No advertising matter is sent through the United States mails directly to prospects and there is no newspaper, magazine, radio or television advertising whatsoever. The only interstate movement of advertising matter is from the home office to its agents. Up to this point it

is obvious that irrespective of what the advertising matter contains the mere placing of this advertising matter in bulk in the hands of the agents would not induce any prospect to purchase the insurance. Every contact with prospects insofar as the advertising matter is concerned occurs wholly within the boundaries of that particular State. The State statute in each State fully, expressly and in detail prohibits the disseminating or circulation of any false or misleading representations either orally or in writing. The Commissioner is given full power to examine and investigate into the affairs of every person engaged in the business of insurance in his State in order to determine whether such person has been or is engaged in any unfair method of competition or any unfair or deceptive act or practice. The Commissioner has full power of subpoena compelling the production of all documentary matter, and the Act gives the District Court the power to punish for contempt upon refusal. The Commissioner is given power to issue cease and desist orders equal in scope to the cease and desist orders which the Federal Trade Commission has power to issue. A violation of a cease and desist order is punishable by a very substantial fine and it is provided that such violation shall also be sufficient ground for the revocation by the Commissioner of certificate of authority of the insurance company to do business in the State and for the revocation of license of such agent. (Appendix, Petitioner's brief, page 67; Appendix "A", Respondent's brief, page 33)

Respondent therefore submits that all of the acts of which Petitioner has made complaint against Respondent in this case may be effectively prevented by the Insurance Commissioner in every State in which Respondent is licensed to do business under the adequate provisions of the regulatory statutes in each of said States.

As stated by the Court of Appeals for the 5th Circuit,

> "If there is an 'irreducible area' of commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it." (R. 116)

Under C, Petitioner's brief, page 25, it is stated:

> "Until the State authorities act to apply this common policy to the same transaction there would seem to be no substantial reason why the Federal and State Governments should not both have jurisdiction."

Respondent submits that this statement is in the face of the plain and clear statement of Congressional policy as expressed in the McCarran-Ferguson Act, and this Court's construction of that Act, in **Prudential vs Benjamin,** where the Court stated:

> "Obviously Congress' purpose was, broadly, to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways, one was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise ex-

> pressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engaged in it 'shall be subject to' the laws of the several States in these respects."

Prior to Southeastern the States had full power of exclusive control certainly as to everything complained of in this case against Respondent, and such control was expressly continued by the McCarran Act.

Referring to D, Petitioner's brief, page 27, respondent does not agree with Petitioner's statement "apart from stating the purpose 'to secure adequate regulations and control of the insurance business' the House and Senate reports on the Bill contain nothing dealing directly with the question presented here."

We quote the following excerpts from such report:

> "From its beginning the business of insurance has been regarded as a local matter to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years leading to the generally accepted doctrine that the business of insurance was not subject to Federal law."

And, further,

> "Your Committee believes there is urgent need for an immediate expression of policy by

> the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal, to comply with State tax laws as well as with other State regulations on the ground that to do so when such laws may subsequently be held unconstitutional in keeping with the precedent smashing decision in the Southeastern Underwriters case will subject insurance executives to both civil and criminal actions for misappropriations of company funds.
>
> "The Committee has therefore given immediate consideration to S. 340, together with a similar measure, HR 1973, so that the several States may know that the Congress desires to protect the continued regulation and the taxation of the business of insurance by the several States and thus enable insurance companies to comply with State laws."

And, further,

> "Enactment of this Bill will (1) remove existing doubts as to the right of the States to regulate and tax the business of insurance, and (2) to secure more adequate regulation of such business." (House Report No. 143, February 13, 1945, U.S. Code Congressional Service, 79th Congress, First Session, 1945, pages 670-673.)

On page 28, Petitioner's brief, it is stated that at the end of 1956 there were 115,949,000 persons in this country with hospital expense protection; there were 101,325,000 with surgical expense protection, and 64,891,000 with regular medical expense protection. Petitioner further states that taking note that the

phenomenal growth of this type of insurance had been accomplished in many instances by false and misleading advertising, that it had undertaken an active campaign to eliminate such practices from the channels of interstate commerce. It then states that since October, 1954, it has issued 41 complaints in this field. With over 115,000,000 people being served, for only 41 complaints to have been filed in 3-1/2 years, and 13 cease and desist orders having been issued, would certainly indicate either that there were not many instances of false and misleading advertising or that the Commission has failed miserably in undertaking an active program to eliminate such practices from the channels of interstate commerce. Respondent believes that Petitioner is not correct in its charge that the phenomenal growth of this type of insurance has been accomplished in many instances by false and misleading advertising, but if Petitioner should be correct in its statement, then its admission that so few complaints have been filed in 3-1/2 years, and only 13 cease and desist orders issued, certainly indicates that the Commission has not undertaken an active campaign or that it does not have sufficient facilities to conduct it, or both.

Petitioner makes the statement, on page 31 of its brief,

> "According to the two decisions Commission jurisdiction is automatically extinguished upon the mere enactment of such legislation; extinguished without regard to the fact that the transactions may, as a practical matter,

be beyond the scope of effective State legislation."

This statement is certainly not true insofar as this case is concerned, because the Court of Appeals for the 5th Circuit had no such question before it and made no such sweeping declaration. Under the facts of this case each State in which Respondent does business has the power to control with absolute effectiveness the advertising of Respondent which is complained of, and none of the transactions complained of is beyond the scope of effective State regulation.

After stating, one page 34 of the brief, that the practices by Respondent are not regulated by State law merely because of the enactment of general State legislation on the subject, Petitioner states, on page 35 of the brief, that in urging the correctness of this constuction Petitioner will first show that no conflict either statutory or administrative exists between the Commission's action and any State law; and second, that a contrary construction would create a regulatory "no man's land" which Congress could not have intended. Third, that the purpose of the McCarran-Ferguson Act was to remove Federal impediments to the execution of State policies and not to bar Federal action wholly consistent with such State policies; and fourth, that the legislative history of the McCarran-Ferguson Act confirms this construction.

Taking these up in order—

A (Brief, page 35). Petitioner states that it is not proceeding against insurance advertisement which

has been approved formally or informally by State authorities. (See testimony of Murphy, this brief, page 14)

At the top of page 36 of the brief Petitioner again takes the position that there is a jurisdictional void. Respondent submits that the McCarran Act leaves no jurisdictional void. The States are given exclusive jurisdiction insofar as their statutes regulate the business, and if there is any area which is unregulated, to that extent, and to that extent only, under the proviso in the McCarran-Ferguson Act does the Federal Trade Commission have jurisdiction.

Respondent asserts that the position taken by Petitioner throughout to the effect that no matter how completely the regulatory statutes of the State cover the situation, that nevertheless the jurisdiction of the Federal Trade Commission attaches until the States enforce all violations of their legislative acts, is obviously unsound. Does Petitioner take the position that it will ride herd on all of the 48 states and that whenever a State fails to enforce its regulatory law according to Petitioner's idea as to how it should be enforced that this will give Petitioner jurisdiction and it will step in and enforce the Federal Trade Commission Act according to Petitioner's notion as to how it should be enforced? It seems to Respondent too obvious for argument that when, as in this case, the regulatory State statutes in every State where Respondent is permitted to do business are as complete and comprehensive as the Federal Trade Commission

Act itself, there is no area left for the exercise of jurisdiction by Petitioner because Petitioner's jurisdiction in the field is only "to the extent that such business is not regulated by State law."

B. (Brief, page 41) Under this heading Petitioner again attempts to ride its pet hobby that if Federal regulations are not exercised in this case there will be an unfilled void, a legal vacuum, a "no man's land". In answer Respondent can but reiterate that in this case there is no void, no legal vacuum, nor is there a "no man's land." The State statutes in every State in which Respondent does business adequately define false and deceptive advertising, adequately provide for its prevention, and as applied to this case there is complete effectiveness because there being no direct mail advertising, no newspaper, magazine, radio or television advertising, and the advertising in each State being disseminated by local agents in that State and entirely within the borders of that state, any violation of such regulatory statute can promptly be stopped by the issuance of a cease and desist order. There also hangs over the head of the insurance company and its agents within the State the cancellation of all licenses to operate, with the additional penalty of heavy fines.

In this case, therefore, there is no extent to which that part of the business of insurance involved in this case is not regulated by State law and, furthermore, there is no extent to which it is not effectively regulated by State law. In this case there can be no

occasion for any State to regulate the advertising practices of Respondent beyond the borders of that particular State. Therefore, Petitioner's pronouncement, brief page 47, "that the authorities of the state of origin can hardly be expected to devote their necessarily limited financial and man power resources to the investigation and prosecution of misrepresentations made to the citizens of the other 47 states", has no bearing whatsoever on this case.

Neither would there be any occasion for a policyholder in any State to seek redress only in some distant State where the insurer is incorporated. Respondent is subject to the jurisdiction of the courts of each State in which it is licensed to do business and the policyholders may obtain complete redress against Respondent in the State of such policyholder's residence.

In the second paragraph, brief page 47, Petitioner states that the problem is even more acute where an insurance company employs no local agent and has no office or assets within the State. That in those circumstances there would seem to be no way in which the State can adequately protect its citizens from false advertising disseminated from out of the state points through the media of the United States mail, newspapers, magazines, radio or television.

As already stated herein, such a hypothetical case has no application whatsoever to the facts of this case.

C. (Brief, page 49) Under this heading Petitioner rides another one of its hobbies which is stated and restated throughout the brief, viz., "The basic distinction is between (1) State insurance laws sanctioning what Federal law forbids, and (2) State insurance laws prohibiting what Federal law forbids."

Petitioner takes the position that it has no jurisdiction under (1) but that it has concurrent jurisdiction under (2). Respondent submits that this position is not sound. Logic would require Petitioner to concede that if the States have full power of regulation and control when their legislative acts sanction what the Federal laws forbid that the States would have the same power of regulation and control when the States' construction of an act is different from the construction of a similar legislative act by the Federal agency. Respondent submits that it is unsound to argue that the Federal Trade Commission should be allowed to regulate the insurance business contrary to the McCarran Act simply upon Petitioner's improbable assumption that the interpretation of the 48 Insurance Commissioners of the advertising matter would be the same as that of Petitioner.

In reaching the conclusion that the allegations of the complaint were not sustained, the Trial Examiner recognized that the brochures were presented by agents in face to face conferences with prospects. He therefore gave reasonable effect to the provisions in the brochures in bold face type to the effect that the benefits are subject to the terms of the policy, are

subject to the limitations of the policy, and other similar provisions, and also assumed that the negotiations would be between persons of average intelligence.

The Trial Examiner also took into consideration the fact that although prior to the hearing the Petitioner's attorneys had access to all of the records of Respondent, including all of the claim files, and in spite of the fact that many thousands of policies had been sold, that not one person testified that there had ever been any deception in the sale of a single policy. The Petitioner's position is thus stated in its brief in the court below, page 9:

> "The Commission was also concerned with the meaning conveyed to the ignorant, the unthinking, and the credulous who in making purchases do not stop and analyze but are governed by appearance and general impressions. It may be that there was no intention to mislead and that only the careless or incompetent could be misled. But if the Commission having discretion to deal with these matters thinks it best to insist on a form of advertising clear enough so that in the words of the Prophet Isaiah 'Wayfaring men though fools should not err therein' it is not for the Courts to revise their judgment."

Respondent submits that it is entirely conceivable that the States in regulating advertising matter might agree with the more reasonable view of this matter taken by the Trial Examiner than with the extreme view taken by the Commission. That the States in regulating advertising matter might take into con-

sideration the use of the advertising matter and the type of persons to whom it is submitted and that where the advertising is presented only in personal conferences with prospects that these prospects are not wayfaring men who are fools but are persons who are presumed to have some intelligence and understanding, and that the States would not feel justified in meticulously dissecting the advertising matter in the attempt to reveal some minor omission which would not enter into the impression created upon a reasonably prudent business man such as the prospects interviewed by Respondent's agents are presumed to be.

At the top of page 50 of the brief Petitioner cites two cases involving the Federal Power Act and states that both of these cases involve a statutory provision strikingly similar to the McCarran Act.

Respondent submits that the provisions of the Federal Power Act referred to and Section 2(b) of the McCarran Act out of their context might have some similarity, but in their context they are about as strikingly dissimilar as any two provisions could be. There is a declaration of the Congressional policy in both the McCarran Act and the Federal Power Act. In the McCarran Act it is stated, "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the

several States." (U.S. Code, Title 15, Section 1011) In the Federal Power Act it is stated: "It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is effected with a public interest and that Federal regulation of matters relating to generation to the extent provided in Sections 824-825 (r) of this Title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest." (U.S. Code, Title 16, Section 824).

The marked dissimilarity in the two Acts is that in the McCarran Act the "clear and specific grant of jurisdiction" is to the States and in the Federal Power Act the "clear and specific grant of jurisdiction" is to the Federal Government through the Federal Power Commission.

In the McCarran Act the exception in favor of the Federal Trade Commission is from the grant of jurisdiction to the States and in the Federal Power Act the exception to the States is from the grant of jurisdiction to the Federal Power Commission.

When we consider this fundamental difference in the two Acts the two cases cited by Petitioner, if they have any bearing at all upon the issues of this case, tend to sustain the position of Respondent rather than the position taken by Petitioner.

D. (Brief, page 55) In reply to this portion of Petitioner's brief Respondent takes the position that

there is no ambiguity in the McCarran Act. As stated by this Court in the **Prudential** case,

> "It is not necessary to spend much time in interpreting the McCarran Act **** Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways, one was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that this business and all who engaged in it 'shall be subject to' the laws of the several States in these respects."

It seems to Respondent that the canon of construction set out in **Ex Parte Collett,** 337 U.S. 55, 61, applies with full force to the McCarran Act. In the case cited this court stated:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Sec. 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inferences in every direction.' Gemsco, Inc., v. Walling, 324 U.S. 244, 260, 89 L. Ed. 921, 933, 65 S. Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions."

However, Petitioner having gone into this subject at some length, Respondent calls the Court's attention to the following:

The McCarran Act was amended on July 25, 1947, by merely extending the so-called moratorium from January 1, 1948, to June 30, 1948. On July 1, 1947, the Senate Committee on the Judiciary, being the Committee having in charge the proposed amendment, made the following statement:

> "This bill extends the so-called moratorium provision of Public Law 15 of the Seventy-ninth Congress from January 1, 1948, until June 30, 1948. The committee is informed and is satisfied that an effort has been exerted by the insurance industry, the insurance commissioners, and the States in dealing with the matter of State regulation. However, the committee recognizes that the problems have not been solved, and is of the opinion that an extension of the so-called moratorium should be granted in order to provide the Congress an additional time to examine into the situation more completely than it has been able to do during the present session. As the committee is of the opinion that considerable study should be given to this matter, and the question of the need, if any, of further Federal legislation it would appear most desirable to extend this moratorium period an additional 6 months, thereby giving the Congress a reasonable time to examine the developments that have taken place in this field during and immediately subsequent to the meetings of the 1947 State Legislatures." (U.S. Code Congressional Service, 80th Congress, First Session 1947, page 1359)

More than ten years have passed since the Senate Committee on the Judiciary stated that they would determine if any further Federal legislation on this question would be needed. Respondent submits that the fact that no further Federal legislation has been enacted in the ten year period is quite conclusive on the question that the Congress is satisfied with the unfair practice and competition acts passed by the State legislatures and that in the opinion of the Congress such State legislation covers adequately the control of the insurance industry insofar as the dissemination of false and deceptive advertising matter is concerned.

CONCLUSION

The Legislatures of all of the States in which Respondent has permit to do business having enacted adequate regulatory laws, and all of the acts complained of by Petitioner against Respondent being subject to complete State control, Respondent respectfully submits that the judgment of the Court of Appeals for the Fifth Circuit in this case be in all things affirmed.

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"Appendix 'A'"

TENNESSEE

Article XIX. Unfair Methods of Competition and Deceptive Acts and Practices.

SECTION.

6459.56. Declaration of purpose.
6459.57. Definitions.
6459.58. Unfair methods of competition or unfair and deceptive acts or practices prohibited.
6459.59. Unfair methods of competition and unfair or deceptive acts or practices defined.
6459.60. Power of commissioner.
6459.61. Hearings, witnesses, appearances, production of books and service of process.
6459.62. Cease and desist orders and modifications thereof.
6459.63. Judicial review of cease and desist orders.
6459.64. Procedures as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.
6459.65. Judicial review by intervener.
6459.66. Penalty.
6459.67. Provisions of act additional to existing law.
6459.68. Immunity from prosecution.
6459.69. Separability provision.

§ **6459.56. Declaration of purpose.**—The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of the Congress of the United States as expressed in the act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which con-

stitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (1947, ch. 202, sec. 1.)

§ **6459.57. Definitions.**—When used in this act:

(a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

(b) "Commissioner" shall mean the commissioner of insurance and banking of this state. (1947, ch. 202, sec. 2.)

§ **6459.58. Unfair methods of competition or unfair and deceptive acts or practices prohibited.**—No person shall engage in this state in any trade practice which is defined in this act as, or determined pursuant to this act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. (1947, ch. 202, sec. 3.)

§ **6459.59. Unfair methods of competition and unfair or deceptive acts or practices defined.**—(a) The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts.—Making, issuing, circulating, or

causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) False Information and Advertising Generally. —Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation.—Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or maliciously derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, Coercion and Intimidation.—(a) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance, or (b) by any act of boycott, coercion or intimidation monopolizing or attempting to monopolize any part of the business of insurance. (c) Nothing in (b) of this part (4) shall be interpreted as defining or determining as an unfair method of competition or an unfair or deceptive act or practice in the business of insurance any act of boycott, coercion or intimidation on the part of any person, unless such act is committed in connection with an intention on the part of such person to monopolize, or attempt to monopolize, any material part of the business of insurance; provided that no insurance company shall be held to have violated the provisions of (b) of this part (4), because of any act of an agent of said company, which act has not been authorized or approved or acquiesced in by the company.

(5) False Financial Statements—Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock Operations and Advisory Board Contracts.—Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) Unfair Discrimination.—(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the

rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates.—(a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not speci-

fied in the contract. (b) Nothing in clause 7 or paragraph (a) of clause 8 of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies, or accident and health policies, issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(9) Requiring Insurance from Particular Company, etc., as Condition Precedent to Loan.—Requiring as a condition precedent to lending money upon the security of a mortgage or lien upon real or personal property, that the borrower for whom such financing is arranged, or the owner of the property, negotiate any policy of insurance covering such real

or personal property through a particular insurance agent or broker, or insurance company; provided, however that this provision shall not prevent the exercise by any lender or lien-holder or mortgagee of its right to approve or disapprove, for reasons affecting solvency or other proper reasons, of the insurance company selected by the owner or borrower to underwrite the insurance; and provided, further, that no lending company shall be held to have violated the provisions of this paragraph (9), because of any act of an agent or loan correspondent of said company, of which act the lending company does not have actual knowledge, and which act has not been authorized, approved or acquiesced in by the lending company.

(10) Acquisition of Stock Lessening Competition. —Acquisition, by a domestic insurance company of the State of Tennessee, of stock or other share capital of another such company engaged in an insurance business of the same type or class, where the effect of such acquisition is to substantially lessen competition between the two companies, or to restrain commerce, or create a monopoly. This paragraph shall not apply to companies purchasing such stock solely for investment and not using the same by voting, or otherwise, to bring about, or attempt to bring about, the substantial lessening of competition.

(11) Holding Office as Director of Two or More Companies.—Holding office, at the same time as a director of two or more domestic insurance companies

of the State of Tennessee, engaged in the same type or class of insurance business, by any individual, if such companies are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any anti-trust law of the United States or of the State of Tennessee. (1947, ch. 202, sec. 4.)

§ **6459.60. Power of commissioner.** — The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section 3 [§ 6459.58] of this act. (1947, ch. 202, sec. 5.)

§ **6459.61. Hearings, witnesses, appearances, production of books and service of process.** — (a) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in section 4 [§ 6459.59] and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than thirty (30) days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this act shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the chancery court of Davidson County or the county where such party resides, on application of the commissioner,

may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and other processes of the commissioner under this act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same. (1947, ch. 202, sec. 6.)

§ **6459.62. Cease and desist orders and modifications thereof.** — (a) If, after such hearing, the commissioner shall determine that the method of competition or the act or practice in question is defined in section 4 [§ 6459.59] and that the person complained of has engaged in such method of competition, act or practice in violation of this act, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from

engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under section 8, subsection (a) [§ 6459.63] of this act for filing a petition for review by writ of certiorari if no such petition has been duly filed within such time or, if a petition for writ of certiorari has been filed within such time, then until the transcript of the record in the proceeding has been filed in the chancery or circuit court, as hereinafter provided, the commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for writ of certiorari, if no such petition has been duly filed within such time, the commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require. (1947, ch. 202, sec. 7.)

§ 6459.63. Judicial review of cease and desist orders.—(a) Any person required by an order of the commissioner under section 7 [§ 6459.62] to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice de-

fined in section 4 [§ 6459.59] may obtain a review of such order in the chancery or circuit court of the county in which the defendant resides, or conducts his business, in the manner provided in sections 9008 through 9018 of the 1932 Code of Tennessee.

(b) To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the commissioner under section 7 [§ 6459.62] shall become final;

(1) Upon the expiration of the time allowed for filing a petition for writ of certiorari, if no such peti-

tion has been duly filed within such time; except that the commissioner may thereafter modify or set aside his order to the extent provided in section 7(b) [§ 6459.62]; or

(2) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.

(d) No order of the commissioner under this act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state. (1947, ch. 202, sec. 8.)

§ 6459.64. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.—(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in section 4 [§ 6459.59], that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than thirty (30) days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the

hearings provided for in section 6 [§ 6459.61]. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this act and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after thirty (30) days after the service of such report cause a petition to be filed in the chancery or circuit court of this state within the district wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite. To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its order commanding obedience to the terms of such order of the commissioner.

(c) A transcript of the proceedings before the commissioner, including all evidence taken and the report and findings, shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the

failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by the preponderance of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

(e) Proceedings under this section 9 shall conform as nearly as possible to the procedure outlined and established by sections 9008 through 9018 of the 1932 Code of Tennessee. (1947, ch. 202, sec. 9.)

§ **6459.65. Judicial review by intervener.**—If the report of the commissioner does not charge a violation of this act, then any intervener in the proceedings may within sixty (60) days after the service of such report, cause a petition for writ of certiorari to be filed in the chancery or circuit court of Davidson

County for a review of such report, as provided in sections 9008 through 9018 of the 1932 Code of Tennessee. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this act. (1947, ch. 202, sec. 10.)

§ **6459.66. Penalty**—Any person who violates a cease and desist order of the commissioner under section 7 [§ 6459.62], after it has become final, and while such order is in effect, shall forfeit and pay to the State of Tennessee a sum not to exceed five thousand ($5,000.00) dollars for each violation, which may be recovered in a civil action. In determining the amount of the penalty the question of whether the violation was wilful shall be taken into consideration. Nothing herein shall be construed as limiting a court in enforcing its own orders. (1947, ch. 202, sec. 11.)

§ **6459.67. Provisions of act additional to existing law.**—The powers vested in the commissioner by this act, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive. Nothing in this act shall be construed as amending or repealing any

statute of the State of Tennessee now in effect. (1947, ch. 202, sec. 12.)

§ **6459.68. Immunity from prosecution.** — If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this state. Any such individual may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immu-

nity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise; and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced. (1947, ch. 202, sec. 13.)

§ **6459.69. Separability provision.** — If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (1947, ch. 202, sec. 14.)